DOCKET

PROCEEDINGS AND ORDERS DATE: 012

CASE NBR 84-1-05609 CFH
SHORT TITLE Green, Roosevelt
VERSUS Zant, Supt.

DOCKETED: Oct 15 198

Date	Proceedings and Orders
Oct 15 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Nov 17 1984	Brief of respondent Zant, Supt. in opposition filed.
Nov 21 1984	DISTRIBUTED. December 7, 1984
Dec 10 1984	Petition DENIED. Brennan and Marshall dissenting: Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited the Eighth and Fourteenth Amendments, Gregg v. Georgia 428 U.S. 153, 227, 231 (1976), we would grant certior and vacate the death sentence in this case. **********
Dec 28 1984	Petition for rehearing filed.

PETITION FOR WRIT OF CERTIORARI

84-5603
No. 84-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROOSEVELT GREEN, JR.,

Petitioner,

-against-

WALTER D. ZANT Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. May a capital petitioner constitutionally be put to death when crucial admissions from a co-defendant -- demonstrating that petitioner was not present at the scene of the homicide, had no intent to kill, and did not contemplate the victim's death -- were unlawfully kept by the State from the jury that passed upon his personal culpability?

2. Does the Double Jeopardy Clause permit the State to resubmit evidence of rape during a second capital sentencing proceeding, after the trial court has found the same evidence to be insufficient to submit rape as an aggravating circumstance in the initial sentencing proceeding?

3. Does a trial court's statement to a jury that a defendant's pro se closing argument contained statements that "should have come from the stand under oath" constitute a comment on his failure to testify proscribed by the Fifth and Fourteenth Amendments?

4. Does the State's introduction into evidence, and subsequent use during its closing sentencing-phase argument, of portions of the victim's ear, bones and flesh comport with the Eighth Amendment requirement that petitioner's death sentence "be, and appear to be, based on reason, rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

No. 84-

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Georgia Diagnostic & Classification
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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner Roosevelt Green, Jr. ("petitioner") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit ("the Court of Appeals") in this case.

CITATIONS TO OPINION BELOW

The original opinion of the United States District Court for the Middle District of Georgia ("the District Court"), which is unreported, is annexed as Appendix A. The original opinion of the Court of Appeals, reported at 715 F.2d 551 (11th Cir. 1983), is annexed as Appendix B. The opinion of the District Court on remand, which is unreported, is annexed as Appendix C. The opinion of the Court of Appeals after remand, reported at 738 F.2d 1529 (11th Cir. 1984), is annexed as Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1984. A copy of the judgment is annexed as Appendix E. A timely petition for rehearing and suggestion for rehearing en banc was denied on September 13, 1984. A copy of the order denying rehearing is annexed as Appendix F. The Court of Appeals stayed issuance of the mandate on September 25, 1984 pending final disposition of the case by this Court, provided that a petition for certiorari is filed with the Court by October 15, 1984. A copy of that order is annexed as Appendix G. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he in any criminal case be a witness against himself;

the Sixth Amendment, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury;

the Eighth Amendment, which provides in relevant part:

> [N]or cruel and unusual punishments inflicted;

and the Fourteenth Amendment, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

This case also involves former Article I, §1, ¶ IX of the Constitution of the State of Georgia of 1976 (Ga. Code Ann. §2-109) which provides:

> No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both;

and former Article I, §1 ¶X of the Constitution of the State of Georgia of 1976 (Ga. Code Ann. §2-108) which provides in relevant part:

> [T]he jury in all criminal cases, shall be the judge of the law and the facts.

STATEMENT OF THE CASE

Petitioner's Role in the Homicide

Petitioner was one of two defendants charged with the December 12, 1976 kidnapping, rape and murder of a young convenience store cashier, Teresa Allen, in Cochran, Georgia. The State chose to try Carzell Moore -- petitioner's co-defendant -- first, on the express theory that it was Moore, not petitioner, who had inflicted the fatal wounds on Ms. Allen. See Moore v. State, 240 Ga. 807, 243 S.E.2d 1 (1978). The State presented extensive evidence at Moore's trial to support the theory that Moore had committed the homicide, including testimony by Moore's long-time friend, Thomas Pasby. Pasby told the jury that Moore had confessed to having killed Ms. Allen after petitioner Green had left the scene of the crime. The Supreme Court of Georgia recounted Pasby's testimony as follows:

> The appellant, Carzell Moore, then raped Miss Allen. After driving further, the appellant told Green to stop the car. The appellant then told Miss Allen to get out. Miss Allen and the appellant then got out of the car. The appellant told Green to drive to a gas station to get gas for the car. After Green left, Miss Allen begged the appellant not to kill her. Miss Allen crossed her arms over her stomach to protect herself. The appellant shot her in the abdomen with the rifle. He then shot her in the face. The appellant stated that he shot Miss Allen in the face in an attempt to disfigure her so as to make it difficult to identify her.

Moore v. State, supra, 240 Ga. at __, 243 S.E.2d at 4. A jury convicted Moore under a malice murder theory, and recommended a sentence of death on June 9, 1977. Id., 240 Ga. at __, 243 S.E.2d at 3.

Petitioner had been charged jointly with Carzell Moore in a single indictment, alleging murder "with malice aforethought." (T1 3, 331).[1/] Petitioner's trial began over seven

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1/ Each reference to the transcript of petitioner's initial

[cont'd.]

months later, on January 23, 1978. During petitioner's trial, the State established that Carzell Moore resided in Cochran, Georgia "approximately a quarter of a mile" from the convenience store where Ms. Allen was abducted. (T1 403). On December 11, 1976, the day before the crime, petitioner Green -- a stranger to Cochran (T1 404, 418-19) -- came to visit Moore (T1 406). A day later, Moore and petitioner abducted Ms. Allen from the Majik Market store near Moore's home about 7:00 P.M. (T1 343). Ms. Allen was taken to a rural road in Monroe County, where her body was found two days later. (T1 447). Her death resulted directly from wounds inflicted by a 30.06 rifle, stolen from a Cochran-area farmer nearly two weeks before the crime. (T1 771).

While the State introduced no direct evidence linking petitioner to the homicide itself, the State did show that Green had been arrested in South Carolina shortly after the crime (T1 586) in possession of Ms. Allen's automobile (T1 585), the 30.06 rifle (T1 587), and some bank bags, apparently taken from the convenience store.(T1 501). It also demonstrated that certain hair samples found on gloves at the crime scene were similar in characteristics to petitioner's hair.(T1 839). Yet this evidence established no more than petitioner's involvement in Ms. Allen's abduction and robbery, not her murder. The only evidence pointing toward involvement in the homicide was the testimony of a young South Carolina woman, produced by the State, who claimed that petitioner had said that he had shot a woman in Georgia.(T1 538).

Petitioner's counsel did not attempt to introduce Thomas Pasby's testimony at the guilt phase of petitioner's

---

1/ cont'd.

trial, held January 23-28, 1978, in the Superior Court of Monroe County, Georgia, will be indicated by the abbreviation "T1" followed by the number of the page on which the reference may be found. Each reference to petitioner's resentencing trial, held November 5-10, 1979, in the Superior Court of Monroe County, will be indicated by the abbreviation "T2."

trial: instead, he underlined for the jury the significance of exculpatory forensic evidence, including testimony by the sheriff who had investigated the crime scene and had taken plaster casts of all footprints he observed in the muddy soil there. (Tl 699). The sheriff noted that while some of the plaster casts matched Hushpuppy shoes belonging to Carzell Moore (Tl 733) that were recovered from his Cochran home (Tl 732), none of the casts matched the 2" to 3" high-heeled shoes that witnesses testified petitioner had been wearing on the day of the crime. (Tl 763 , 437).

The State argued to petitioner's jury at the close of the guilt phase -- contrary to its contention in Carzell Moore's trial -- that petitioner had killed Ms. Allen:

> This girl was shot to death with that rifle and it's in Roosevelt Green's hands, he was seen with it, and he shot her, he killed her and dumped her out there. You've got the proof. You've got the evidence in this case, Ladies and Gentlemen, this man had the murder weapon, he had the dead girl's car, he had the money from the store and her hair was found in the sweater in his possession, her hair was found in the glove . . . out there on the side of the road. The evidence is here, Ladies and Gentlemen, all this evidence . . . can lead you to one possible conclusion.

(Tl 1014). The trial court thereafter instructed petitioner's jury on guilt or innocence under a theory of malice murder.[2/] The Court also charged the jury specifically on the issue of intent.[3/]

2/ The defendant in this indictment is charged with the offense of murder and the Court will read the statute to you as it applies to the charge made in the indictment. A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

(Tl 1081).

3/ The Court charges you that intent is an essential and material element of the offense charged. . . . The Court charges you that mere presence at the scene of an alleged crime is not sufficient to authorize a verdict of guilty. The evidence must show that a crime was committed,

[cont'd.]

Finally, the Court charged the jury on a theory of "parties to a crime," (Tl 1080).[4/] After two hours of deliberations (Tl 1186, 1091), the jury returned specifically to ask the Court "to go over that portion of the Charge that stated the law concerning two people when they are together at the scene of a crime." (Tl 1092). The Court complied by repeating that crucial instruction. (Tl 1093-94).

Less than an hour later (Tl 1091, 1098), the jury returned with a verdict finding petitioner guilty as charged. (Tl 1098).

3/ cont'd.

> as alleged, and that the defendant participated therein. The Jury must find, before you would be authorized to find a defendant guilty, that he was present at the scene of the alleged crime and his presence is an essential element of the crime as alleged in the indictment, and the burden of proof as to such rests upon the State."

4/

> The Court charges you that every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of a crime. A person is concerned in the commission of a crime if he directly commits the crime, or intentionally aids and abets another in the commission of a crime. The Court charges you that a person who aids in the concealment of the crime of murder after the fact, but had no knowledge that the crime of murder would be committed before the fact, cannot be found guilty of murder as party to the crime, under our law as I read it to you.

(Tl 1080).

At the sentencing phase, petitioner attempted to introduce Thomas Pasby's testimony to demonstrate that petitioner had neither participated in the murder of Ms. Allen, nor intended her death. (T1 1116). In an offer of proof, Pasby gave the following account:

> Q. Would you tell the Court what you [sic] testimony was in that trial [the Carzell Moore trial] as to the conversations between you and Carzell Moore relating to the murder, the killing of Teresa Carol Allen?
>
> * * *
>
> A. He said that . . . he and the girl got out and when Green left, he shot the girl.
>
> Q. He meaning who?
>
> A. Carzell Moore.
>
> Q. Carzell Moore said when Green left, he shot the girl?
>
> A. Right.
>
> Q. What else did he say?
>
> A. He said that Green didn't know -- he said Green didn't know or didn't believe that he was gonna do it but when Green came back, the girl was dead and they picked her up and threw her -- put her -- threw her in some bushes.
>
> Q. He said Green did not know about it prior to his killing her?
>
> A. He either said that Green -- he said that Green didn't know or he didn't believe it, or he didn't believe that he was gonna kill the girl but Green had left and when he came back, he had killed her.

(T1 1123-24). The State objected repeatedly to the admission of this testimony (T1 1116, 1127-28, 1131) on the ground that it would be inadmissible hearsay (T1 1127), and the trial court excluded the testimony. (T1 1134-37).

During its closing argument at the sentencing phase, the State repeated its position that petitioner Green had taken an active role, not only in the robbery and kidnapping, but in the murder as well:

> It took two people to do this act and it took two people to kidnap her, it took two people to rob the store, it took two people to navigate the automobile with her in it all the way to Monroe County, and I submit to you that [petitioner] . . . is the other man who was involved in this case and who actively participated in it and it's impossible, of course, for the State or for you Ladies and Gentlemen to know who pulled that trigger out there because we were not there. We couldn't possibly bring any evidence other than the circumstantial evidence and the direct evidence that we had pointing to who did it . . . I don't know whether Carzell Moore fired the first shot and handed the gun to Roosevelt Green and he fired the second shot or whether it was vice versa or whether Roosevelt Green had the gun and fired the shot or Carzell Moore had the gun and fired the first shot or the second, but I think it can be reasonably stated that you Ladies and Gentlemen can believe that each one of them fired the shots so that they would be as equally involved and one did not exceed the other's part in the commission of this crime.

(T1 1222-23). After three and one-half hours of deliberations, the jury returned, recommending a sentence of death. (T1 1242).

On appeal, the Supreme Court of Georgia affirmed. Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978), with two justices dissenting on the ground that Pasby's testimony should have been admitted. On certiorari, this Court summarily reversed, holding that

> [r]egardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see Lockett v. Ohio, 438 U.S. 586, 604-605 (1978)(plurality opinion); id. at 613-616 (opinion of Blackmun, J.)

Green v. Georgia, 442 U.S. 95, 97 (1979)(per curiam).

During petitioner's second sentencing trial, the State reintroduced much of the same evidence it had offered at the first trial, with two important additions. First, the young South Carolina woman who initially testified that petitioner had confessed to having shot a girl somehere in Georgia (T2 940)

substantially modified her testimony on cross-examination:

> Q. Is it possible that he could have said to you something like this; that he had to go back to Georgia or he was going back to Georgia because he had a friend who shot a girl in Georgia and he was going to see about it? Is it possible that that is what he said?
>
> A. Could have been, I'm not sure, you know.
>
> Q. You're actually not sure what he said?
>
> A. I'm -- well, the conversation came up, you know, we was just sitting there talking and that came up in conversation. I'm not sure whether that's the way he said or whether he said he shot a girl in Georgia, you know.
>
> Q. Could have been either way?
>
> A. Yea, could have been.

(T2 942-43). Secondly, Thomas Pasby's testimony was, for the first time, set before petitioner's jury. Pasby indicated that he had been with Moore sometime in late November or early December of 1976 when Moore stole the 30.06 rifle eventually used in the homicide. (T2 919-21). He also revealed that Moore had confessed to shooting Ms. Allen to "[k]eep her from identifying him," (T2 929), since both had lived in Cochran. Pasby repeated the testimony concerning petitioner Green's role in the homicide:

> Q. Can you tell the Jury what he [Carzell Moore] said?
>
> A. He said that he had robbed the store, he and Green and that he killed the girl.
>
> * * *
>
> A. Well, he said that both of them raped her and they they -- I guess they went on and then he said they got to some place off the road, in the country or something and that he told Green to go get some gas and then he shot her once and then he said he shot her again and then when Green came back, they picked her up and threw her in the bushes.

(T2 912-13).

> * * *
>
> Q. And he told you that before the first shot was fired, he had told Roosevelt Green to take the car and go somewhere else?
>
> A. Yes.

> Q. And you recall precisely what he told Green to do?
>
> A. He said he told Green to go get some gas.
>
> Q. Did he say to you anything that would indicate his opinion as to whether Roosevelt Green knew that he was about to shoot her?
>
> A. He said that Green didn't know he was gonna shoot her.
>
> Q. Green didn't know, is that right?
>
> A. It -- I'm not absolutely sure but he either said that Green didn't know or didn't believe it.

(T2 931).

The trial court did not instruct petitioner's jury to make any findings on petitioner's role in the homicide, and it made no such finding. The trial court instead instructed the jury that "this defendant, Roosevelt Green, Jr., was found guilty as charged for the offense of murder by a trial jury," (T2 1123), and it requested a sentencing verdict based upon the jury's assessment of aggravating and mitigating circumstances (T2 1126-34).[5/] The court expressly instructed the jury that "[i]t is wholly within your discretion, if you find that the offense was committed under one or more statutory aggravating circumstances, to recommend death or not. You may or may not, in the event of that finding, make a recommendation of death just as you see fit." (T2 1132). The jury, finding both statutory aggravating circumstances to have been proven, returned a verdict of death.(T2 1139).

5/ The statutory aggravating circumstances charged were that the murder was committed during the commission of kidnapping and armed robbery, and that the offense was outrageously vile, horrible or inhuman. (T2 1131).

The trial court itself made the only finding at the resentencing trial on petitioner's degree of involvement in the homicide. In a Trial Judge's Report, mandated in capital cases under former Ga. Code Ann. §27-2537(a), the trial judge indicated that the following mitigating circumstances had been proven:

> The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor."

(T2 Record, at 115).

On appeal, petitioner contended to the Supreme Court of Georgia that his death sentence was excessive and disproportionate, since he did not intend the death of the victim and was not even present when the fatal shots were fired. Green v. State, 246 Ga. 598, __, 272 S.E.2d 475, 485-86 (1980). The Georgia Supreme Court made no factual findings on this point -- nor could it, since under the Georgia Constitution, exclusive responsibility for factfinding in a criminal case is vested in the trial jury.[6/] Instead, ignoring the crucial point that no factfinder had passed on petitioner's precise role, and treating the claim as if it were merely challenging the sufficiency of the evidence, the Georgia court held that "[a] rational finder of fact . . . could have found from the record, beyond a reasonable doubt, that the appellant either shot the victim or was present when it occurred." 246 Ga. at __, 272 S.E.2d at 486. (emphasis added). Turning to an alternative theory, the Georgia court held as a legal matter that petitioner's involvement, even under his own theory of the facts, was constitutionally sufficient to permit imposition of a death sentence:

6/ Former Ga. Const. Art. I, §I, ¶ 8 (Ga. Code Ann. §2-108) reads in relevant part: "[T]he jury in all criminal cases, shall be the judges of the law and the facts." See Former Ga. Code Ann. §§27-2301, 26-3102 (1976).

> The evidence most favorable to the defense shows that the appellant actively and knowingly participated in the entire criminal enterprise including the robbery, kidnapping and rape of the victim. He left her on a lonely rural road on a cold wet night with a person he knew to be armed and violent. He went for gas and when he returned he helped throw her mutilated body into the underbrush. He then took some of the stolen money, the victim's car and the murder weapon and fled the state. The defendant's participation in the murder cannot on any reasonable basis, be termed minor.

Id. Thus neither alternative holding rested upon an independent factual finding by the Georgia Supreme Court, or upon the malice murder finding by petitioner's initial guilt-or-innocence jury (which of course had been rendered without benefit of the excluded testimony of Thomas Pasby.) Instead, the Georgia court rejected petitioner's claim on legal grounds.

Subsequently, in his federal habeas corpus petition, petitioner pleaded that "[t]he imposition of a sentence of death in a case such as this, in which the petitioner has not taken life, attempted to take life, or intended to take life, violates the Eighth and Fourteenth Amendments to the Constitution of the United States." Fed. Petition, ¶ 21. The District Court did not address this claim separately in its final order, holding only that petitioner "has been constitutionally convicted in the courts of this State of murder and sentenced to die." Appendix A.

In its initial order on appeal, the Court of Appeals remanded for an evidentiary hearing on another issue, reserving its judgment on this claim. Appendix B, 715 F.2d at 554. In its subsequent opinion, the Court of Appeals rejected this claim, reasoning that the malice murder verdict rendered by petitioner's initial jury foreclosed all further consideration of this claim:

> The jury in this case was squarely presented with an indictment charging malice murder; it was carefully instructed on the elements of the offense; and there was evidence in the record to support its verdict. We mut therefore conclude that the jury's decision finding Green guilty of malice murder forecloses us from considering petitioner's Enmund claim.

Appendix D, 738 F.2d at 1534.

The State's Resubmission of Evidence on Rape

The initial indictment against petitioner was in two counts: of murder, and of rape. (Pre-Tr. 14).[7/] During pretrial proceedings, however, the State unexpectedly announced that it was abandoning the rape count. (Pre-Tr. 36). The trial court expressed its understanding of the prosecutor's intention as follows:

> BY THE COURT: . . . Now, he has just said . . . that rape could be considered an aggravating circumstance. He's not going to try him for the offence of rape and if he offers evidence that the defendant was guilty of rape, then he is contending . . . I gather that he would say that that would be a circumstance along with other alleged aggravating circumstances that the Jury could consider but not for the offense of rape.
>
> BY MR. SMITH (the prosecutor): That's correct.

(Pre-Tr. 36).

During the guilt-or-innocence phase of petitioner's trial, the State did introduce evidence to suggest that petitioner may have raped Ms. Allen, including a medical description of vaginal injuries sustained by Ms. Allen (Tl 783), and testimony that petitioner's sweater, recovered from his suitcase (Tl 813), contained traces of seminal fluid consistent with petitioner's bloodtype.(Tl 814-818). During the sentencing phase, the State offered still further evidence on the sexual injuries to Ms. Allen.(T2 1107). However, the State serologist testified that vaginal swabs from Ms. Allen revealed seminal fluid that could have come from Carzell Moore but could not have come from petitioner Green. (T2 1110-13). Moreover, as petitioner's

7/ Each reference to the transcript of pretrial proceedings held on January 6 and 20, 1978, in the Superior Court of Monroe County will be indicated by the abbreviation "Pre-Tr.," followed by the number of the page on which the reference may be found.

counsel established on cross-examination, some trace of petitioner's seminal fluid would have been detected by the serologist even absent ejaculation, if any lubricating fluid whatsoever were being produced during sexual entry by petitioner. (Tl 1112-15).

Prior to closing argument, petitioner's counsel addressed the trial court, urging that rape not be submitted as an aggravating circumstance:

> Now, Your Honor, the notice of aggravating circumstances as to Count One -- Murder Number One, it says this, 'The offense of murder was committed while the offender was engaged in the commission of additional capital felonies, to-wit: the rape, kidnapping and armed robbery of Teresa Carol Allen.' I ask the court not to charge the Jury, not to instruct the Jury as to rape because there's been absolutely no evidence of rape, been absolutely no evidence that this man was involved in the commission of rape.

(Tl 1213).

In its closing arugment the following morning, apparently apprised of the trial court's intent to grant petitioner's request and refuse a charge on rape, the State omitted all reference to that aggravating circumstance. (Tl 1217-18). When petitioner's counsel, in his closing argument, adverted to rape, arguing that "what you heard about this . . . is very conclusive evidence that this man did not rape that girl," (Tl 1227), the State interrupted the argument, stating, "We did not submit that portion and I understood the Court has taken that portion out of the consideration of the Jury and I did not argue that." (Tl 1228). The trial court sustained the objection, informing petitioner's counsel that rape would not be "an issue before the Jury." Id. In fact, the trial court omitted any instruction on rape as a possible aggravating circumstance (Tl 1237), and the jury's sentencing verdict contained no finding on rape.

During petitioner's resentencing trial, however,the State once again sought to introduce expert evidence of Ms.

Allen's sexual attack. (T2 832). Petitioner's counsel immediately objected outside the presence of the jury:

> Your Honor . . . I anticipate that this witness will as he has before, make statements and did at the last trial, make statements concerning vaginal swabbings, damage in the vaginal canal, evidence which tends to indicate rape . . . Now, in the original trial of this case, the issue of rape was completely ruled out as relates to this defendant. The issue of rape was stricken from the aggravating circumstances when submitted to the Jury because of failure of proof. The State simply failed to prove that enough to even have the Jury charged on the issue . . . We ask the Court to specifically limit the State and not allow the State to go into any evidence which would tend to indicate rape because, first of all, that's been ruled out of this case and that's been done, and second of all, the evidence will indicate that the other man did the rape.

(T2 833).

The trial court overruled petitioner's objection, holding that the evidence of rape "is admissible under the second aggravating circumstance in that the offense was outrageously and wantonly vile, horrible and inhuman." (T2 833-35). The State thereupon introduced medical testimony concerning the sexual injuries to Ms. Allen (T2 835-36) and concerning seminal fluid taken from petitioner's sweater (T2 868-78), over petitioner's continued objection.(T2 878-79).

During closing argument, the State expressly contended to the jury that "Roosevelt Green . . . killed, raped, robbed, kidnapped and mutilated Teresa Carol Allen," (T2 1021), forcing petitioner's counsel to deal at length with the rape allegation in his own closing argument. (T2 1047-52). In its sentencing charge, the trial court expressly addressed the issue of rape, appearing to place the burden to disprove rape on petitioner:

> The defendant contends that Roosevelt Green did not rape Teresa Carol Allen and he contends that is a mitigating circumstance. . . . Now, if you find that mitigating circumstance existed as contended . . . then I charge you to consider those also in arriving at your decision on the appropriate penalty to be imposed.

(T2 1130)(emphasis added).

After deliberation, the jury returned a verdict of death, relying both upon the statutory aggravating circumstance of kidnapping and armed robbery, and upon the circumstance that the murder was outrageously and wantonly vile, horrible and inhuman.(T2 1139).

On appeal to the Supreme Court of Georgia, substitute counsel for petitioner contended that the resubmission of evidence of rape at his resentencing trial violated his right to be free of double jeopardy. Green v. Georgia, supra, 246 Ga. at __, 272 S.E. 2d at 481. Substitute counsel properly contended that the State had sought a finding on rape, but overlooked the fact that the trial court had refused even to submit the aggravating circumstance because of the State's failure of proof, incorrectly suggesting that rape had been submitted and implicitly rejected by the jury. Counsel did, however, plainly argue the theory of res judicata and collateral estoppel on the issue of rape. The Georgia Supreme Court did not make any such distinction the basis of its decision, instead simply holding that "[t]he statutory aggravating circumstances set forth in Code Ann. §27-2534.1 (b)(1-10) are not offenses within the meaning of the double jeopardy clause . . .[and that] the trial court did not err in admitting the contested evidence." Id.

In his federal habeas petition, petitioner alleged that "[t]he State's submission of evidence on aggravating circumstances previously adjudicated in petitioner's favor violated the Fifth and Fourteenth Amendment protection against double jeopardy." Fed. Petition ¶ 26. Petitioner's counsel again failed to isolate the precise gravamen of its double jeopardy claim, suggesting that rape had been submitted to, but rejected by, petitioner's initial sentencing jury, id. at ¶ 27, rather than noting that it had been rejected by the trial court because of the State's failure of proof. The District Court did not rely on that distinction, however, but instead denied relief summarily.

On appeal, the Court of Appeals correctly apprehended that rape had not been charged to petitioner's initial jury. However, it erroneously read the record to suggest that "the state did not ask for a finding that the murder had been committed in the course of a rape," Appendix D, 738 F.2d at 1540, thereby ignoring the State's announced and repeated intention to rely on rape as an aggravating circumstance until informed by the trial court, after the close of all evidence, that its evidence had been insufficient even to submit the rape allegation to the jury.

Since the initial sentencing jury had expressed in its verdict no "implicit refusal to find petitioner guilty of rape," id., the Court of Appeals found "no constitutional barrier to admitting evidence of the alleged rape at petitioner's second sentencing trial." Id. The Court of Appeals, reasoning that "sexual abuse may constitute 'torture' for the purpose of finding an aggravating circumstance under section 17-10-30(b)(7)," held that petitioner's resentencing "jury may well have taken the alleged rape into account in its consideration of whether the crime demonstrated torture to the victim and depravity of mind on the part of the defendant." Appendix E, 738 F.2d at 1540. The Court of Appeals also rejected any extension of the double jeopardy holding of Bullington v. Missouri, 451 U.S. 430 (1981) to bar relitigation of factual findings on statutory aggravating circumstances in capital sentencing proceedings. Rejecting the argument that "factual findings on statutory aggravating circumstances are also the equivalent of a jury verdict on guilt or innocence," id., at 1541, the Court of Appeals concluded that "the legal significance that attaches to a jury's decision whether to state a given aggravating circumstance in support of its verdict is simply not comparable to that of the verdict itself." Id.

The Trial Court's Comment on Petitioner's Failure to Testify

A Georgia defendant in 1978 had a state constitutional right to serve as his own co-counsel in a criminal case. See Article I, §1, ¶ IX of the Constitution of the State of Georgia of 1976 (Former Ga. Code Ann. §2-109). At the outset of his resentencing trial, petitioner's counsel filed a written motion seeking leave for petitioner to exercise that right.(T2 Record, 37-38). The court granted the motion, laying down guidelines for petitioner's participation in his trial. (T2 5-9). Petitioner complied fully with those guidelines, even filing a written statement indicating that he sought to make a brief closing argument. (T2 Record, 92). The trial court agreed to that request. (T2 1032).

Petitioner, though a layman, carefully argued inferences from the evidence during his closing argument. He first noted the significance of Thomas Pasby's testimony: "Thomas Pasby testified that I was not there. I was not present when Carzell Moore killed Teresa Carol Allen. Ladies and Gentlemen, he testified that I had no knowledge." (T2 1032). Then, addressing each of the State's alleged aggravating circumstances in turn, petitioner argued that the jury should not apply them, given the facts of his case:

> [T]he State contends and wants y'all to find. 'The offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim and depravity of mind on the part of the defendant.' Ladies and Gentlemen, like I tell you, it was horrible, but how, how could it cause depravity of mind on my part when I wasn't there; when I didn't have no idea that this man was going to kill this young lady. And sure, it was a horrible murder, but I did not commit the murder, so I didn't inflict the depravity of mind on my part --.

(T2 1034).

At that point, the State interrupted, contending that petitioner should not be permitted to make such an argument. The trial court agreed, and addressed the jury:

BY THE COURT: You are correct. I will state to the Jury, this man has not testified during the trial of the case and the State did not have an opportunity to cross examine him and he cannot make an unsworn statement to you at this time concerning the things he's just saying. He's acting as his own co-counsel and he is allowed to argue the evidence in the case, but he cannot get before you now and give testimony or give evidence. That should have come from the stand under oath, if he desired to do it. I will sustain the objection.

(T2 1034)(emphasis added). Petitioner's counsel immediately moved for a mistrial, observing that "[t]he Court's instructions to the Jury went far beyond what was necessary to cure any, what we consider to be if it was a mistake, was inadvertent, the Court's instruction went so far as to comment to the Jury on the defendant's failure to testify." (T2 1035).

The trial court declined to order a mistrial, and issued no curative instruction, (id.), indeed complaining out of the presence of the jury that "he's not tutored in the law, he doesn't know what he's doing and he ought not to be up here to start with." (T2 1036). Later, at the close of the case, the trial court gave extensive sentencing instructions, during which it briefly charged the jury that "in this case, the defendant's failure to testify in his favor shall not create a presumption against him." (T2 1126).

Petitioner argued on appeal to the Supreme Court of Georgia that the trial court had violated his Fifth and Fourteenth Amendment rights by commenting on his right to remain silent. See Green v. State, supra, 248 Ga. at __, 272 S.E.2d at 482. The Georgia Supreme Court held that "the trial court did not abuse its discretion in ruli-g the [petitioner's] argument improper," id., and that "the trial court's instructions to the jury as quoted were not direct comments on the failure of the defendant to testify, but were explanations as to why such statements were to be disregarded by the jury." Id.

In his federal habeas petition, petitioner alleged that "[t]he trial court in the re-sentencing trial commented on petitioner's failure to testify, in violation of his Fifth Amendment right to remain silent, his Eighth Amendment right to a reliable sentencing determination, and his Fourteenth Amendment right to due process." Fed. Petition, ¶ 138. The District Court summarily denied relief. (Appendix A). On appeal, the Court of Appeals affirmed, relying solely upon one case, United States v. Lepiscopo, 429 F.2d 258 (5th Cir.), cert. denied, 400 U.S. 948 (1970), in which a trial court had rebuked in similar fashion a defendant "who had adopted the practice of making asides to the jury during his questioning of an adverse witness," Appendix D, 738 F.2d at 1539 (though only after the defendant had received two prior warnings that proved unavailing.) Id.

The State's Use of Portions of the Victim's Corpse

During petitioner's resentencing trial, an investigating officer testified that portions of Ms. Allen's ear, a piece of bone with skin attached, and other fragments of bone had been found near her body at the crime scene. (T2 726-27). The State then introduced into evidence a photograph of the severed ear of Ms. Allen taken at the scene. (T2 728, 995). Over petitioner's objection, the State also introduced into evidence the withered remains of Ms. Allen's ear itself, and other pieces of bone and skin found near the body. (T2 726-27, 994-95). Petitioner's counsel unsuccessfully objected that the ear "had no probative value. . . There's a photograph that we are going to agree [will be] . . . tendered into evidence, where the ear was found, but to put in actual member[s] from a person's body into evidence for the Jury to look at that is only intended to inflame their minds . . . since it has no probative value, it has no other purpose than to inflame the minds of the Jury." (T2 994). The

trial court admitted the evidence, suggesting that "[i]t might have some probative value relating to the velocity of the weapon, something of that nature." (T2 995).

During closing argument, the State deliberately used the gruesome exhibits to stir the jury's emotions:

> And what did these animals do? They took this high-powered 30.06 weapon and they stuck it down on her face and they pulled the trigger again. And what did it do? Well, you've seen what it did and you'll have to look at it again. It blew the side of her head off and it blew some of it seven feet from where her body was found . . . Now you can call this [demonstrative evidence] vile and defense attorneys will tell you that it ought to be buried but it was sure found down there. Part of this young girl's body, her ear, found down there at the scene . . . [I]t has been admitted for whatever purpose and whatever probative value you twelve Ladies and Gentlemen give it. You can believe it in part or whole or you can discount it, but I'll tell you, Ladies and Gentlemen, that it's hard to look at dried flesh contained in State's Exhibit ## 26, ## 27, and ## 28 and not believe that it was there, and not believe that that is what happened in this case.

(T2 1026).

On appeal to the Supreme Court of Georgia, petitioner argued that the admission of this evidence at the resentencing trial violated his Eighth and Fourteenth Amendment rights. Green v. State, supra, 246 Ga. at __, 272 S.E.2d at 481. The Georgia Supreme Court noted that it had previously approved the admission of the evidence at the initial guilt-or-innocence trial, and it adhered to its prior holding. Id. (On the original appeal, the Georgia court had found the evidence "relevant for the jury's consideration of the causal connection between the rifle possessed by the appellant, the cartridge fired therefrom and injuries to the victim," Green v. State, 242 Ga. 261, __, 249 S.E.2d 1, 6 (1978)).

In his federal habeas petition, petitioner alleged that "[t]he introduction into evidence of the portions of the

victim's corpse at the re-sentencing trial subjected petitioner to a capital sentencing decision so infected by passion and emotion as to violate the Eighth and Fourteenth Amendments." R.d. Petition ¶ 134. The District Court summarily denied relief. Appendix A .

On appeal, the Court of Appeals observed that "[a]lthough we would not wish to endorse the state's practice, this court has already held that the introduction of such evidence is permissible where it 'depict[s] the scene of the crime,' Hance v. Zant . . . and we are of course bound by that decision." Appendix D, 738 F.2d at 1538.

REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A PETITIONER MAY BE CONSTITUTIONALLY PUT TO DEATH UNDER ENMUND V. FLORIDA, 458 U.S. 782 (1982), EVEN THOUGH CRUCIAL EVIDENCE THAT HE NEITHER KILLED, ATTEMPTED TO KILL, NOR INTENDED TO KILL WAS WITHHELD BY THE STATE FROM THE ONLY FACTFINDER THAT EVER PASSED UPON HIS INDIVIDUAL CULPABILITY

In Enmund v. Florida, 458 U.S. 782 (1982), the Court held the imposition of a death sentence on "one who neither took life, attempted to take life, nor intended to take life," id. at 787, violates the Eighth Amendment. "The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' Lockett v. Ohio, 438 U.S. 586, 605 (footnote omitted), which means that we must focus on 'relevant facets of the character and record of the individual offender,' Woodson v. North Carolina, 428 U.S. 280, 304 (1976)." Enmund v. Florida, supra, 458 U.S. at 798.

In the wake of Enmund, a cluster of related questions have arisen concerning the proper allocation of factfinding responsibility required under the Eighth Amendment. One sharp division of opinion has arisen among the circuits over whether

-- in the absence of a factfinding by a state trial judge or jury on a defendant's personal culpability -- a federal court may itself assess a defendant's culpability based solely upon its review of the appellate record. Compare Reddix v. Thigpen, 728 F.2d 705 (5th Cir.), adhered to on reh'g, 732 F.2d 494 (5th Cir. 1984)(vacatur of death sentence necessary in absence of a state factfinding on defendant's personal criminal intent); Jones v. Thigpen, No. 83-4085 (5th Cir., Sept. 17, 1984)(same); Bullock v. Lucas, No. 83-4702 (5th Cir., Sept. 21, 1984)(same); with Stanley v. Zant, 697 F.2d 955, 973 (11th Cir. 1983)(federal court finding that defendant's participation was sufficient under Enmund); Ross v. Hopper, 716 F.2d 1528, 132-33 (11th Cir. 1983), vacated and pending en banc, 729 F.2d 1293 (11th Cir. 1984) (resolving Enmund claim on "[a]n examination of the record in this case as construed by the Georgia Supreme Court"); Henry v. Wainwright, 721 F.2d 990, 995 (5th Cir. Unit B 1983)(same); Stephens v. Kemp, 721 F.2d 1300, 1303 (11th Cir. 1983)(same); Drake v. Francis, 727 F.2d 990, 996-97 (11th Cir.), vacated and pending en banc, __F.2d __ (11th Cir. 1984)(same).

State appellate courts have likewise differed on whether they can properly remedy a constitutional failure at the trial level to assess personal responsibility by making independent factfindings on appeal. Compare Ex parte Raines, 429 So.2d 1111, (Ala. 1982)(remanding for jury finding on defendant's participation); State v. McDaniel, 665 P.2d 70, 81 (Ariz. 1983)(requiring trial judges in all future capital cases tried under felony murder theories to determine defendant's personal culpability); Carlos v. Superior Court, 197 Cal. Rptr. 79, 672 P.2d 862 (1983)(interpreting statute in light of Enmund to require a finding of intent to kill for capital felony murder); State v. Stokes, __ N.C. __, 304 S.E.2d 184, 195 (1983)(requiring specific jury findings on degree of participation where Enmund question raised)

with Clines v. State, 280 Ark. 77, 656 S.W.2d 684, 686-87 (1983) (appellate court finds sufficient culpability under Enmund, relying in part on trial jury's rejection as a mitigating factor of claim that appellant had played a minor role); State v. Gibson, 675 P.2d 33, 42 (Idaho 1984)(appellate court apparently resolves issue of intent under Enmund from trial record); Garcia v. State, 97 Ill.2d 58, 454 N.E.2d 274 (1983), cert. denied, __U.S. __, 82 L.Ed.2d 854 (1984)(Brennan & Marshall, JJ., dissenting)(same); Resnover v.State, 460 N.E.2d 922, 934-35 (Ind. 1984)(same); Leatherwood v. State, 435 So.2d 645, 655-57 (Miss. 1983)(same); Smith v. State, 659 P.2d 330 (Okla. Cr. App. 1983), death sentence vacated, Smith v. Oklahoma, __U.S.__, 78 L.Ed.2d 297 (1983) (same).

One vital question encompassed within the broader debate on the allocation of factfinding responsibility -- a question squarely presented by the Court of Appeals' opinion in the present case -- is whether grave evidentiary deficiencies can ever render a finding on personal culpability in the initial factfinding process infirm under the Eighth Amendment. Here, as the lower court correctly noted, the jury which convicted petitioner of malice murder necessarily made a finding that Green had participated directly in a homicidal act. Yet that finding was made without any knowledge that petitioner's co-defendant had admitted sole responsibility for the homicide, at a time when petitioner was not even present, without his knowledge or acquiescence. Petitioner unsuccessfully sought to bring the co-defendant's damning admission to the jury's attention, but the State, which had relied upon it to secure a death sentence against the co-defendant, successfully fought its admission on technical evidentiary grounds.

This Court, holding that the exclusion of this evidence violated due process by removing from the jury's consideration "testimony that was highly relevant to a critical issue in the punishment phase of the trial," directed that petitioner be

afforded a new sentencing trial. Green v. Georgia, 442 U.S. 95 (1979). At that resentencing trial, however, though the co-defendant's admission was introduced, the trial court did not require the jury to make any finding respecting petitioner's individual culpability for the homicide, nor was any factfinding later made by the Georgia Supreme Court on appeal.[6] Petitioner, in short, was sentenced to death, and his sentence has been affirmed in the court below, based solely upon a finding of culpability made by a jury that lacked all knowledge of crucial testimony bearing on his participation in the crime, testimony which the State itself had heavily relied upon to obtain a death sentence against petitioner's co-defendant.

This Court has consistently spoken of the special "need for reliability in the determination that death is the appropriate punishment," Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell & Stevens, JJ.), insisting that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," Lockett v. Ohio, 438 U.S. 586, 604 (1978); accord, Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); id., 117-18 (O'Connor, J., concurring). The Court of Appeals' decision in this case plainly conflicts with this Court's demand for reliability in capital sentencing proceedings.

6/ Indeed, the only relevant finding case from the trial judge, who, as part of a statutorily required Trial Judge's Report, noted that "[t]he defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor."

Even in non-capital cases, the Court has been vigilant to vacate convictions when a jury's verdict concerning a defendant's mental culpability may have been compromised by procedural deficiencies in the factfinding process. See, e.g., Sandstrom v. Montana, 442 U.S. 510 (1979)(conviction vacated when unconstitutional presumption may have shifted burden of proof on intent); see also Francis v. Franklin, No. 83-1590, cert. granted, __U.S.__, 81 L.Ed.2d 873 (1984); United States v. United States Gypsum Co., 438 U.S. 422 (1978); United States Brotherhood of Carpenters and Joiners v. United States, 330 U.S. 395 (1947); Bollenbach v. United States, 326 U.S. 607 (1946). Here, the total exclusion from the jury's consideration of critical evidence respecting petitioner's role in the crime surely crippled the jury's ability to assess petitioner's individual culpability far more seriously than did the use of erroneous presumptions in Sandstrom and the cases cited above. Yet the Court of Appeals relied solely upon that inadequate jury finding in rejecting petitioner's Enmund claim.

In so doing,furthermore, the Court of Appeals set itself in conflict, not only with applicable prior decisions of this Court, but with the only other circuit that has considered this issue since Enmund was decided. In Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984), cert. pending, __U.S.__, 53 U.S.L.W. 3115 (U.S., Aug. 21, 1984), (No. 84-169), the Tenth Circuit vacated a death sentence imposed by a jury that had been deprived by the State of evidence suggesting that defendant Chaney may not have acted alone. The Tenth Circuit did not vacate Chaney's convictions for kidnapping and murder, but did set aside his death sentence, holding in light of Enmund v. Florida, that the evidence "'might have affected' the jury's decision on the death penalty," 730 F.2d at 1357, since "[t]he withheld reports contained important mitigating evidence supporting the inference that

another person or persons were involved in the kidnappings and murders, and that Chaney may not have personally killed the victims or have been present when they were killed." Id.

Chaney is distinguished from the present case only in the means employed by state prosecutors to exclude the crucial evidence from jury consideration. In Chaney, the State adopted a narrow construction of defense counsel's written request for exculpatory evidence; here, the State urged on the trial court a narrow reading of a state evidentiary rule. In both cases, the trial jury was deprived of the crucial evidence, and their factfindings were similarly infirm and unreliable.

In view of the important federal question resolved by the Court of Appeals contrary both to the prior decisions of this Court and to the decision of the Tenth Circuit in Chaney, the Court should grant certiorari and review the judgment below.

II

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER WELL-ESTABLISHED PRINCIPLES OF COLLATERAL ESTOPPEL OR RES JUDICATA UNDER THE DOUBLE JEOPARDY CLAUSE FORBID RESUBMISSION, TO A CAPITAL SENTENCING JURY, OF EVIDENCE OF AGGRAVATING CIRCUMSTANCES THAT WAS FOUND INSUFFICIENT AT THE INITIAL SENTENCING TRIAL

This Court has long held that the Double Jeopardy Clause forbids the reprosecution of a defendant solely "for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Burks v. United States, 437 U.S. 1, 11 (1978); accord, Green v. Massey, 437 U.S. 19 (1978); Hudson v. Louisiana, 450 U.S. 40 (1981); Green v. United States, 355 U.S. 184 (1957). Once the State has been afforded "one fair opportunity to offer whatever proof it could assemble," Burks v. United States, supra, 437 U.S. at 16, "[r]epeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." Tibbs v. Florida, 457 U.S. 31, 41 (1982). It is immaterial whether

the State's evidence has been found insufficient by a reviewing court, e.g., Burks v. United States, supra, 437 U.S. at 11, or by the trial court, e.g., Hudson v. Louisiana, supra, 450 U.S. at 43; in either case, the policies against double jeopardy have been offended.

A related principle requires a trial court to give collateral estoppel effect to a fact necessarily determined adversely to the State in any prior criminal proceeding. Ashe v. Swenson, 397 U.S. 436 (1970); see, e.g., Turner v. Arkansas, 407 U.S. 366 (1972); Harris v. Washington, 404 U.S. 55 (1971); Simpson v. Florida, 403 U.S. 384 (1971). Otherwise a prosecutor would do "what every good attorney would do . . . refin[e] his presentation in light of the turn of events at the first trial . . . . [which is] precisely what the constitutional guarantee forbids." Ashe v. Swenson, supra, 397 U.S. at 447.

In recently holding that "the protection afforded by the Double Jeopardy Clause to one acquitted by a jury is also available to him, with respect to the death penalty, at his retrial," Bullington v. Missouri, 451 U.S. 431, 446 (1981), the Court has recognized that the strong parallels between a capital sentencing proceeding and a traditional guilt or innocence trial compel application of Fifth and Fourteenth Amendment guarantees to both proceedings. In Arizona v. Rumsey, __U.S.__, 81 L.Ed.2d 164 (1984), the Court last Term reaffirmed its decision in Bullington, and held that a sentencing judge, having once rejected the State's aggravating circumstances and sentenced a defendant to life imprisonment, could not thereafter resentence him capitally, even though the sentencer was later held to have misinterpreted one of the statutory aggravating circumstances.

In the present case, the State announced both orally and in writing, prior to petitioner's initial trial, that it would seek to obtain a sentence of death against petitioner,

relying in part upon evidence that he had raped the homicide victim. During that trial, the State introduced evidence concerning rape, but in an apparently unexpected development, a State serologist gave testimony that almost conclusively established petitioner's non-participation in the rape. Indeed, at the close of the sentencing phase, petitioner's counsel successfully urged the trial court not even to submit the aggravating circumstance of rape, because of the insufficiency of the State's proof. The trial court agreed, and the aggravating circumstance was not submitted.

Yet at petitioner's resentencing trial, the State was permitted to resubmit evidence of rape, over petitioner's continuing objection, under a theory that the evidence bore on whether the murder was outrageously or wantonly vile, horrible or inhuman.

Petitioner maintains that the State's use of this obviously prejudicial evidence violated the Double Jeopardy Clause, whether the issue be analyzed as one involving a directed verdict of "acquittal" of the rape aggravating circumstance at the first trial, or as one involving collateral estoppel principles under Ashe. The state courts which have addressed this issue are in conflict on whether an aggravating circumstance, not found by an initial factfinder, may be resubmitted. Compare State v. Silhan, __N.C. __, 275 S.E.2d 450, 482 (1981)("[t]he dictates a[gainst] double jeopardy would preclude the state from relying on any aggravating circumstance [at a resentencing trial] of which it offered insufficient evidence at the [initial] hearing"); with Jones v. State, 411 So.2d 165 (Fla.) cert. denied, __U.S.__, 459 U.S. 891 (1982)(Brennan and Marshall, JJ., dissenting); State v. Gilbert, 283 S.E.2d 179, 182 (S.C. 1981); Hopkinson v. State, 664 P.2d 43 (Wyo. 1983). See also Knapp v. Cardwell, 667 F.2d 1253, 1263-65 (9th Cir. 1982).[9/]

9/ Several courts have in fact held that Bullington principles suffice to preclude a State from introducing evidence of a

[cont'd.]

The Court of Appeals refused an "extension of the Court's reasoning in Bullington," holding that "factual findings on statutory aggravating circumstances are [not] . . . the equivalent of a jury verdict on guilt or innocence." Appendix D, 738 F.2d at 1541. Yet in United States v. Martin Linen Supply Co., 430 U.S. 564 (1977), this Court stressed that "what constitutes an 'acquittal' [for purposes of double jeopardy] is not to be controlled by the form of the judge's action." Id. at 571. Double jeopardy principles apply when "the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." Id. The trial court's refusal here to submit the aggravating circumstance of rape to the jury, following the State's failure of proof, constituted precisely such a "resolution . . . of [a] . . . factual element[]." It thus requires no "extension" of Bullington to apply either the "acquittal" principle of Martin Linen Supply or the collateral estoppel principle of Ashe v. Swenson to the State's resubmission of evidence of rape permitted at petitioner's resentencing trial.

The Court should grant certiorari to consider whether the holding of the Court of Appeals on this important federal question is consistent with the Double Jeopardy Clause.

9/ cont'd.

defendant's prior convictions at a second enhancement proceeding (under an habitual criminal sentencing statute) if the State's evidence of those convictions has been found insufficient at the initial proceedings. See, e.g., Bullard v. Estelle, 665 F.2d 1347 (5th Cir.), vacated on other grounds, __U.S.__, 74 L.Ed.2d 987 (1983); Cooper v. State, 631 S.W.2d 508 (Tex. Cr. App.1982); State v. Hennings, 670 P.2d 256 (Wash. 1983). If Bullington principles bar the use of such evidence in a non-capital context, surely they apply with even greater force to this capital sentencing proceeding.

III

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A TRIAL COURT MAY COMMENT ADVERSELY ON A DEFENDANT'S FAILURE TO TESTIFY IN ADMONISHING THE DEFENDANT, SERVING AS HIS OWN CO-COUNSEL, ON THE PROPER SCOPE OF HIS CLOSING ARGUMENT

Comment by a trial court on a defendant's failure to testify is prohibited by the Fifth and Fourteenth Amendments, Griffin v. California, 380 U.S. 609 (1965), as "a remnant of the 'inquisitorial system of justice' . . . which the Fifth Amendment outlaws. It is a penalty for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Griffin reflects the recognition that a defendant's privilege against self-incrimination would have little meaning if those who chose to assert it could later be condemned for their silence. "[A] defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify." Carter v. Kentucky, 450 U.S. 288, 301 (1981).

In the present case, petitioner had been expressly authorized by the trial court, pursuant to Ga. Code Ann. §2-109, to make a closing argument as co-counsel on his own behalf. The trial court had instructed petitioner prior to the argument not to use the occasion to give unsworn testimony. During his closing, petitioner began to make an inferential argument, drawing upon the testimony of Thomas Pasby, that since evidence indicated that he was not present when Ms. Allen was killed, he could not have had the "depravity of mind" which was an element of one of the aggravating circumstances asserted by the State. At that point, the State interjected, asserting that petitioner's argument was improper. The trial court first sustained the objection, then went on to make the following speech to the jury:

> I will state to the jury, this man has not testified during the trial of the case and the State did not have an opportunity to cross examine him and he cannot make an unsworn statement to you at this time concerning the things he's just saying.

> He's acting as his own co-counsel and he is allowed to argue the evidence in this case, but he cannot get before you now and give testimony or give evidence. That should have come from the stand, under oath, if he desired to do it.

(T2 1034)

Petitioner maintains that his jury argument constituted a proper, even a compelling inference from the evidence introduced by the State. However, that is not the issue, for even assuming that the State's objection was proper, there was no valid justification for the trial court's protracted address to the jury. A simple direction that petitioner's argument was not evidence would have sufficed. Instead, the court took pains to emphasize that "this man has not testified during the trial of the case [and that] . . . should have come from the stand, under oath, if he desired to do it." (emphasis added). Despite petitioner's immediate motion for a mistrial, the court gave no corrective instruction, instead stating to counsel its belief that appellant "ought not to be up here to start with." It is, of course, constitutionally irrelevant that the comment came during petitioner's exercise of his Georgia constitutional right to serve as his own co-counsel. As the Second Circuit has held in United States v. Curtiss, 330 F.2d 278, 281 (2d Cir. 1964), "Appellant's summation as his own attorney did not constitute a waiver of his Fifth Amendment protection. Nor could it be used as an excuse to disregard the admonition against 'comment or argument about his failure to testify'" 330 F.2d at 281. While petitioner's decision not to testify, but instead to give a closing argument drawing on the evidence of other witnesses, may have itself been significant in the minds of some jurors, "[w]hat the jury may infer, given no help from the court is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is another." Griffin v. California, supra, 380 U.S. at 614. Here, where the principal issue was whether petitioner had been present at the

scene of the homicide or had participated directly in the murder, an inevitably harmful effect of the trial court's remark was to devalue the testimony of Thomas Pasby in the mind of the jury, by reminding them, at a critical moment, that petitioner himself might have taken the stand, but did not, to explain his own whereabouts at the time of the homicide.

Conceivably, the trial court could have converted this unconstitutional reference to petitioner's silence into harmless error by promptly following the comment with a curative instruction on the petitioner's right to remain silent. For example, in United States v. Bynum, 566 F.2d 914, 918-19 (5th Cir. 1978), the court found that a reference to a pro se defendant's failure to testify (coming after nine improper factual assertions by the defendant) was nevertheless harmless error, where it was combined with immediate reference to the defendant's right to remain silent. In the present case, however, the trial court gave no prompt curative instruction. Only after the completion of all arguments, during its closing jury charge, did the court briefly state: "Now, in this case, the defendant's failure to testify in his own favor shall not create a presumption about him." (T2 1126). This one-sentence instruction was too brief and uninformative to cure the major constitutional error, and it came far too late. In order to cure an unconstitutional reference to the defendant's failure to testify, several circuits have held that a corrective instruction should immediately follow the improper comment. See, e.g., Desmond v. United States, 345 F.2d 225, 226-27 (1st Cir. 1965); United States v. Handman, 447 F.2d 853, 855 (7th Cir. 1971).

The Court of Appeals disposed of petitioner's claim with no more than a single reference to another circuit case, United States v. Lepiscopo, 429 F.2d 258 (5th Cir.), cert. denied, 400 U.S. 948 (1970). Yet, in that case, the trial court's rebuke followed repeated judicial warnings to the

defendant concerning his misbehavior in cross-examining a government witness; the offending remark itself -- "You'll have your opportunity to be sworn and testify, if you care to do so" -- occurred at a point in the trial when the defendant still had the option to be sworn and testify. In this case, by constrast, no prior warning preceded the trial court's damaging remarks to the jury, and since the defense case had been closed, petitioner's opportunity to minimize the adverse impact of the remarks by t stifying was past.

"This Court has always broadly construed [the Fifth Amendment's] . . . protection," because "of the place this privilege occupies in the Constitution and in our adversary system of justice, as well as the traditional respect for the individual that undergirds the privilege." Maness v. Meyers, 419 U.S. 449, 461 (1975). "To apply the privilege narrowly or begrudgingly -- to treat it as an historical relic, at most merely to be tolerated -- is to ignore its development and purpose." Quinn v. United States, 349 U.S. 155, 162 (1955). The court should grant certiorari to review the Court of Appeals' narrow and begrudging interpretation of petitioner's Fifth Amendment right.

IV

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE STATE'S INTRODUCTION INTO EVIDENCE OF PORTIONS OF THE VICTIM'S EAR, BONES AND SKIN INJECTED CONSTITUTIONALLY IMPERMISSIBLE PASSION OR PREJUDICE INTO THE SENTENCING PHASE OF PETITIONER'S CAPITAL TRIAL

During petitioner's resentencing trial, an investigating officer testified that a portion of an ear, a piece of bone with skin attached, and other fragments of bone had been found near the body of the deceased. The State introduced into evidence a photograph of the severed ear, taken by the investigating officers at the scene of the crime. Over the objection of defense counsel, the State also introduced into evidence the remains of the ear itself and other pieces of bone and skin found near the body. The investigating officer, who identified

the remains as portions of the victim's corpse, noted that "[t]hey have dried up some" and did not appear in the same condition as when they were found. During closing argument, the State held these portions of the victim's corpse before the eyes of the jury, declaiming that

> you can call this vile and defense attorneys will tell you that it ought to be buried but it was sure found down there. Part of this young girl's body, her ear, found down there at the scene . . . it's hard to look at dried flesh contained in State's Exhibit 26,27 and 28 and not believe that it was there. . . "

(T2 1026).

Both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment require that the decision to impose a sentence of death must be a reasoned and rational determination and not the product of passion or emotion. In Gregg v. Georgia, 428 U.S. 153 (1976), the Court upheld Georgia's death penalty statute against Eighth Amendment challenge in part because of the express statutory requirement that the state supreme court review every death sentence to determine whether it "was imposed under the influence of passion, prejudice, or any other arbitrary factor." Former Ga. Code Ann. §27-2537(c)(1); see Gregg v. Georgia, supra, 428 U.S. at 198. In Gardner v. Florida, 430 U.S. 349, 358 (1977), the Court stressed that:

> It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

The Court reiterated this principle in Godfrey v. Georgia, 446 U.S. 420, 428 (1980), reversing a death sentence which could not be said to be "'based on reason rather than caprice or emotion.'" Id. Accord, Barclay v. Florida, __U.S.__, 77 L.Ed. 2d 1134, 1150 (1983)(Stevens & Powell, JJ., concurring in the judgment).

In earlier capital cases, as well, the Court has paid careful heed to the constitutional concern that the decision to extinguish the life of an individual must not be the product of passion or emotion. See, e.g., Irvin v. Dowd, 366 U.S. 717,

728 (1961)("[w]ith his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion"); Moore v. Dempsey, 261 U.S. 86, 91 (1923)(due process prohibits deprivation of an accused's life where "counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion").

Although the Court has sought not to inject itself unnecessarily into decisions on the scope of sentencing evidence, "[i]t would be erroneous to suggest . . . that the Court has imposed no substantive limitations on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate." California v. Ramos, __U.S. __, 77 L.Ed.2d 1171, 1180 (1983). Whatever the ultimate constitutional reach of the proscription against death sentences based upon passion and emotion, the present case rather obviously demands its application. The evidence presented at petitioner's resentencing trial over his objection -- the withered, misshapen ear of the eighteen-year-old victim and other pieces of her skin and bone -- was gruesome and by nature inflammatory. The calculated appeal to passion inherent in this grisly evidence was not in any way justified or offset by a serious evidentiary purpose for the admission of the evidence. The State itself offered no plausible justification for bringing these pieces of the victim's corpse before the jury. Although the trial court suggested that the evidence "might have some probative value relating to the velosity [sic] of the weapon," T2 995), this rationale is manifestly insufficient, since the caliber and velocity of the weapon employed were never at issue. Moreover, even if there had been any legitimate evidentiary purpose for portraying these objects to the jury, that purpose would have been amply satisfied by the photographs of the same portions of the corpse which the State had been permitted to introduce into evidence. The photographs at least depicted the victim's

ear in the original condition at the scene of the crime, whereas the ear itself had become so dessicated that it no longer reflected the condition in which it had been found.[10/]

Under common-law evidentiary principles, gruesome evidence must be excluded when, as in the present case, the danger of passion and prejudice outweighs the probative value of the evidence. See, e.g., Maxwell v. United States, 368 F.2d 735, 739-40 (9th Cir. 1966); Holcomb v. State, 130 Ga. App. 154, 155, 202 S.E.2d 529, 531-32 (1973); Commonwealth v. Batty, 482 Pa. 173, __, 393 A.2d 435, 437-38 (1978). In capital cases, this common law prohibition against unnecessary injection of passion into the decisionmaking process surely rises to a constitutional level. When, as here, portions of the victim's body are admitted into evidence even though their admission does not serve any purpose other than inflaming the passions of the jury, it cannot be said that the ensuing sentence of death both is "and appear[s] to be, based on reason rather than caprice or emotion." Gardner v. Florida, supra, 430 U.S. at 358; Godfrey v. Georgia, supra, 446 U.S. at 428. Certiorari should be granted here to set some outer limit on the use of such prejudicial evide

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10/ The Court of Appeals, though "not wish[ing] to endorse the state's practice," Appendix D, 738 F.2d at 1538, nevertheless affirmed under authority of another Eleventh Circuit case, Hance v. Zant, 696 F.2d 940, 951 (11th Cir. 1983), which had permitted the introduction of such evidence "where it 'depict[s] the scene of the crime.'" Even if Hance were decided correctly, it would not properly govern disposition of petitioner's case, since the State introduced photographs accurately depicting the scene and these bits of the victim's corpse, by the admission of the State's own witness, were not an accurate depiction.

CONCLUSION

A writ of certiorari should issue to review the judgment of the Court of Appeals.

Dated: October 15, 1984

Respectfully submitted,

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APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 84-5609

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROOSEVELT GREEN, JR.,

Petitioner,

-against-

WALTER D ZANT, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

APPENDICIES

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INDEX TO APPENDICIES

Appendix A

Order in Green v. Zant, No. 82-161-2-MAC, entered November 24, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

ROOSEVELT GREEN,
Petitioner,
vs. CIVIL ACTION NO. 82-161-2-MAC
WALTER D. ZANT,
Respondent.

FILED
at 4:40 p.m.
NOV 24 1982
Mary B. Stone
Deputy Clerk, U.S. District Court
MIDDLE DISTRICT OF GEORGIA

O R D E R

In accordance with Rule 8 of the Section 2254 rules this court has already denied petitioner Roosevelt Green, Jr.'s motion for an evidentiary hearing. A review of the expanded record submitted on November 23, 1982, reaffirms the court's judgment that an evidentiary hearing is not required.

Rule 8 provides "if it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require." Pursuant to the dictates of that rule the undersigned United States District Judge has carefully examined the (a) voluminous transcripts of petitioner's trial; re-trial; and habeas hearing in state court, (b) briefs submitted to the courts of this State and the Supreme Court of the United States, (c) petitioner's habeas application to this court and brief of law, and (d) respondent's answer and brief. Having done so, it is this court's considered judgment that petitioner Roosevelt Green, Jr. has been constitutionally convicted in the courts of this State of murder and sentenced to die. His petition for a writ of habeas corpus alleging to the contrary is therefore DENIED.

SO ORDERED, this 24th day of November, 1982.

Wilbur D. Owens, Jr.
United States District Judge

Appendix B

Opinion in Green v. Zant, 715 F.2d 551 (11th Cir. 1983)
rendered September 19, 1983

Roosevelt GREEN, Jr.,
Petitioner-Appellant,

v.

Walter D. ZANT, Respondent-Appellee.

No. 82-8772.

United States Court of Appeals,
Eleventh Circuit.

Sept. 19, 1983.

Georgia prisoner sought federal habeas relief. The United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., Chief Judge, denied relief without an evidentiary hearing, and petitioner appealed. The Court of Appeals, Vance, Circuit Judge, held that evidentiary hearing and appropriate fact-findings were required where material facts pertaining to claim that discharge of one juror during deliberations on resentencing without investigating the circumstances violated constitutional rights were not adequately developed in state court, state court did not articulate legal standard it was applying and circumstances of dismissal raised suggestion that juror's refusal to impose death penalty was a factor in her dismissal.

Remanded for further proceedings.

1. Federal Civil Procedure ⇐2091

Federal district court has discretion to remove a juror when the juror's capacity to perform his duties becomes impaired.

2. Federal Courts ⇐936

Dismissal of a juror for want of any factual support or for a legally irrelevant reason is prejudicial.

3. Federal Civil Procedure ⇐2091

In cases wherein nature of a juror's inability to proceed is not readily evident, some hearing or inquiry into the situation is appropriate to the proper exercise of judicial discretion to retain or remove the juror.

4. Habeas Corpus ⇐113(12)

When reviewing a petition for habeas corpus, scope of appellate inquiry is not the broad exercise of supervisory power that federal appellate courts possess in regard to federal district courts, and before a state prisoner may prevail he must show that the asserted error is of constitutional magnitude.

5. Jury ⇐100

Under *Witherspoon*, a juror's decision that death is not appropriate under the facts of a given case is not constitutionally sufficient to permit his or her discharge and a juror may be excused in death qualification procedures only if his or her views would compel the juror to vote automatically against imposition of a death penalty in all cases.

6. Constitutional Law ⇐287

It would violate due process for court to dismiss a juror because of his or her refusal to impose the death penalty in a given case. U.S.C.A. Const.Amends. 5, 14.

7. Federal Civil Procedure ⇐2091

Trial courts have discretion to dismiss ill jurors, but there is no discretion to dismiss a juror who is not in fact ill or otherwise incapacitated.

8. Jury ⇐149

In view of indication that juror's refusal to impose death sentence stemmed from determination of inappropriateness of that penalty under the facts, the state trial court had a constitutional duty to adequately investigate the need for discharge before discharging the juror, whom chairperson indicated had become incapacitated, especially as juror had actively participated in deliberations.

9. Habeas Corpus ⇐90

Primary responsibility for fact-finding resides with the state court and where facts necessary to support a constitutional claim have not been adequately developed in state court, a federal evidentiary hearing is necessary in a habeas proceeding.

10. Habeas Corpus ⇐90

Question of whether fact-findings were actually made by a state court is a threshold inquiry in a federal habeas proceeding and that inquiry must occur prior to any discussion of presumption of correctness given state court factual determinations and before examination of the six particularized *Townsend* circumstances which warrant an evidentiary hearing. 28 U.S.C.A. § 2254(d).

11. Habeas Corpus ⇐85.1(2)

State court findings of primary, historical fact may be express or implied, and while express findings are preferable, they are not necessary. 28 U.S.C.A. § 2254(d).

12. Habeas Corpus ⇐85.1(2)

It is possible to infer fact-findings from clearly articulated or well-settled legal principles relied on by a state court and the issue may arise in three contexts: the record may clearly reveal that the state court applied the correct legal standard, or it may reveal that it applied the incorrect legal standard or it may not reveal the standard

applied, and factual reconstruction may be possible in the first two instances but is most difficult in the third unless the relevant legal principle is particularly well settled. 28 U.S.C.A. § 2254(d).

13. Habeas Corpus ⇐85.1(2)

Even where state court does not articulate the legal principal it is applying, federal habeas courts may properly assume that the state trier of fact applied correct standards of federal law to the facts, absent indicia of unreliability. 28 U.S.C.A. § 2254(d).

14. Habeas Corpus ⇐113(13)

Remand for evidentiary hearing on state prisoner's habeas petition was required where material facts pertaining to claim that discharge of a juror during deliberations and without investigating the circumstances violated constitutional rights were not adequately developed in state court, state court did not articulate legal standard it applied and circumstances of dismissal raised suggestion that juror's refusal to impose death penalty was a factor in dismissal.

15. Habeas Corpus ⇐85.1(2)

For purposes of statutory presumption of state court fact-findings, it does not matter whether state trial court or appellate court is the fact finder. 28 U.S.C.A. § 2254(d).

16. Federal Courts ⇐841

Fact-finding is a basic responsibility of district, rather than appellate courts.

John Charles Boger, New York City, for petitioner-appellant.

Virginia H. Jeffries, Wm. B. Hill, Jr., Asst. Attys. Gen., Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

VANCE, Circuit Judge:

Roosevelt Green, Jr. was convicted of murder and sentenced to death for his part in the kidnapping and murder of Teresa Allen, an eighteen year old student who was abducted from her job as a part time cashier at a Majik Market convenience store in Cochran, Georgia, on December 12, 1976. The Supreme Court of Georgia affirmed the conviction. *Green v. State*, 242 Ga. 261, 249 S.E.2d 1 (1978). The United States Supreme Court granted certiorari, vacated petitioner's death sentence and remanded for further proceedings. *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). The Georgia Supreme Court remanded the case to the trial court with directions to retry the sentencing portion of the trial. *Green v. State*, 244 Ga. 27, 257 S.E.2d 542 (1979).

Retrial resulted in reimposition of the death sentence. The Supreme Court of Georgia affirmed. *Green v. State*, 246 Ga. 398, 272 S.E.2d 473 (1980). The United States Supreme Court denied certiorari. *Green v. Georgia*, 450 U.S. 936, 101 S.Ct. 1402, 67 L.Ed.2d 372 (1981).

Petitioner filed for a writ of habeas corpus in the Superior Court of Butts County on June 11, 1981, which was dismissed by the court in an order also dated June 11. On June 12, the Georgia Supreme Court granted a stay of execution pending disposition of an application for certificate of probable cause, and subsequently remanded for an evidentiary hearing. Following the hearing, the Superior Court dismissed the petition and denied relief. The Georgia Supreme Court denied an application for a certificate of probable cause and the United States Supreme Court denied certiorari. *Green v. Zant*, 455 U.S. 962, 102 S.Ct. 1483, 71 L.Ed.2d 680 (1982).

Green filed the present petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia and thereafter filed a motion for an evidentiary hearing. The district court denied both the motion and petition and Green appeals to this court.

Green raises ten issues before this court: whether the trial court's discharge of one juror during deliberations on petitioner's resentencing without investigation violated petitioner's sixth, eighth and fourteenth amendment rights; whether Green's death sentence violates the prescription of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) against imposition of capital punishment upon one who himself neither took life, intended to take life, nor attempted to take life; whether non statutory aggravating circumstances were improperly admitted during Green's resentencing proceeding; whether submission during Green's resentencing trial of evidence relevant to statutory aggravating circumstances which had been previously adjudicated in his favor violated his fifth amendment right to be free of double jeopardy; whether the state improperly prevented Green from introducing evidence in mitigation; whether jurors were excluded in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); whether introduction into evidence of portions of the victim's corpse during the resentencing proceeding so infected Green's trial with passion and prejudice as to violate his rights under the eighth and fourteenth amendments; whether the trial court improperly commented on Green's failure to testify; whether the trial court erred in refusing to instruct the sentencing jury that Green was presumed innocent of aggravating circumstances; whether Green was denied the effective assistance of counsel. Because the record is inadequate to support resolution of the first issue, we remand for an evidentiary hearing on that issue and express no opinion as to the remaining issues. This panel will retain jurisdiction over the case. We instruct the district court to certify its findings and the record of its proceedings to us within ninety days of issuance of this opinion. *Coleman v. Zant*, 708 F.2d 541, 544 (11th Cir.1983); *Spivey v. Zant*, 661 F.2d 464, 478 (5th Cir. 1981), cert. denied, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982).

The record reveals the following undisputed facts. Approximately three hours after they began their sentencing deliberations, the jury returned to the courtroom and the foreperson asked the judge "can a sentence be given, 'life in prison without parole?'" The court responded that it could not answer the question. After another brief question and answer, the jury began to withdraw to resume its deliberations.

At this point, one of the jurors, Dorothy Mae Ponder Todd, fell to the floor in the hallway outside the courtroom and in an audible voice repeatedly cried "I can't do it."

Shortly thereafter, the foreperson returned to the courtroom and the following colloquy took place:

BY THE COURT: Let the record show that the Foreperson of this Jury, Mrs. Martha McGee, has been requested to come back into the Courtroom by the Court and the Court desires to ask a question of Mrs. McGee. Mrs. McGee, I understand that the Juror, Dorothy Mae Ponder Todd a few moments ago upon leaving the Courtroom fainted in the corridor, is that correct?

BY FOREPERSON McGEE: Yes, sir.

BY THE COURT: And you have stated to me that upon returning to the Jury room, this Juror is in your opinion incapable of continuing deliberation in this case because of the fact that she is physically and emotionally unable to continue and participate in the deliberation of this Jury, is that true?

BY FOREPERSON McGEE: Yes, sir, it is.

BY THE COURT: And has this person requested of you that she be released from further service?

BY FOREPERSON McGEE: Yes, sir.

BY THE COURT: In your opinion, from having examined her, is she in this condition?

BY FOREPERSON McGEE: Yes, sir, she is.

BY THE COURT: You may go back to the Jury room.

BY THE COURT: Sheriff Bittick, I'm going to direct you to remove Juror Dorothy May Ponder Todd from the Jury room. This is being done at her request and upon the advise and at the request of the Jury Foreperson, Mrs. McGee, conveying this Juror to a doctor or some medical facility for the purpose of having her examined and receiving such treatment as she might require.

The record does not suggest that the court attempted to speak to juror Todd herself concerning her condition. No medical advice was sought, nor were there any precautions taken to guard against the possibility that this juror might simply have been reluctant to continue to maintain her position during deliberations. In any event, Todd was replaced by the first alternate.

During petitioner's state habeas corpus hearing, juror Todd submitted an affidavit which was admitted into evidence. The affidavit stated that Ms. Todd was one of two jurors voting against the death penalty and that her statement "I can't do it" referred to her conviction that a death sentence should not be imposed in this case. The affidavit also makes clear that Ms. Todd felt capable of continuing in jury service and would have so informed the trial court if she had been given the opportunity:

> I heard testimony as a juror for the entire sentencing trial as charged by the Court.
>
> After a lunch break on Saturday, November 10, we began deliberations.
>
> I heard all the evidence and participated [sic] fully in the deliberations. A secret ballot was taken by the foreperson. The vote was 10-2 in favor of the death penalty. I voted against the death penalty.
>
> Just before 5:00 p.m., the jury returned to the courtroom with two questions for the Court concerning whether life imprisonment meant no parole and whether it was possible to have testimony of a witness read to us.
>
> After the judge said what he did, I felt that the other juror would be more likely to give the death sentence because he thought that Roosevelt Green would be paroled.
>
> We then went out of the courtroom. Before I got on the elevator, I collapsed. I had never collapsed before in my entire life.
>
> *I had every intention of continuing as a juror. I don't remember ever making any statements to anyone asking to be taken off the jury.*
>
> *The judge never asked me personally whether I could continue. I was capable of continuing to serve as a juror* and I'm sure that I would have stanided [sic] firm with my convictions.

(emphasis added).

Petitioner contends that the trial court erred by not questioning juror Todd or further investigating her illness. Green has stated a colorable claim of constitutional magnitude. Under the peculiar facts of this capital case, Green's "valued right to have his trial completed by a particular tribunal," *United States v. Jorn*, 400 U.S. 470, 480, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971), quoting *Wade v. Hunter*, 336 U.S. 684, 688, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949), and his sixth amendment right to a fair, impartial and representative jury may well have required that the trial court investigate the need to discharge juror Todd.

[1, 2] Georgia law provides that an alternate juror may be substituted if "a juror ... becomes ill, or upon other good cause shown to the court is found unable to perform his duty." Ga.Code Ann. § 59-810. Similarly, a federal district court possesses the discretion to remove a juror when that juror's capacity to perform his duties becomes impaired. "There must be some 'sound' basis upon which the trial judge exercise[s] his discretion" to remove the juror. *United States v. Rodriguez*, 573 F.2d 339, 342 (5th Cir.1978). Dismissal of a juror "for want of any factual support, or for a legally irrelevant reason" is prejudicial. *Id.* In many cases the nature of the juror's inability will be evident as the court so that a hearing on the issue is unnecessary. *See, e.g., Cherry v. Director, State Board of Corrections*, 635 F.2d 414, 417 (5th Cir.1981) (en banc), cert. denied, 454 U.S. 848, 102 S.Ct. 150, 70 L.Ed.2d 134 (1982) ("Common experience teaches that the sudden death of a juror's parent would so emotionally incapacitate the juror as to make his uninterrupted service impractical"); *Henderson v. Lane*, 613 F.2d 175, 178 (7th Cir.), cert. denied, 446 U.S. 986, 100 S.Ct. 2971, 64 L.Ed.2d 844 (1980) (heart attack and hospitalization of juror); *United States v. Rodriguez*, 573 F.2d at 331-32 (juror failed to appear, instead reporting by telephone that he preferred to go to work); *United States v. Smith*, 550 F.2d 277, 280-86 (5th Cir.), cert. denied, 434 U.S. 841, 98 S.Ct. 138, 54 L.Ed.2d 105 (1977) (two jurors sleeping in open court); *United States v. Cameron*, 464 F.2d 333 (3d Cir.1972) (juror sleeping); *United States v. Meinster*, 484 F.Supp. 442 (S.D.Fla.1980), cert. denied, 457 U.S. 1138, 102 S.Ct. 2960, 73 L.Ed.2d 1354 (1982) (heart attack).

[3] Where the disability of the juror is less certain or obvious, however, some hearing or inquiry into the situation is appropriate to the proper exercise of judicial discretion. *See Cherry v. Director, State Board of Corrections*, 635 F.2d at 419 (action dismissing juror for illness was "not abrupt, but was taken only after inquiry and overnight deliberation"); *United States v. Gaskin*, 320 F.2d 42, 49 (6th Cir.), cert. denied, 429 U.S. 933, 97 S.Ct. 349, 50 L.Ed.2d 339 (1976) (court questioned the sleeping juror before replacing him); *United States v. Pruden*, 511 F.2d 25, 27 n. 19 (6th Cir.), cert. denied, 422 U.S. 1042, 95 S.Ct. 2654, 45 L.Ed.2d 693 (1975) (court questioned juror before dismissing — basis of nervous condition).

[4] When reviewing a petition for habeas corpus, however, our scope of inquiry is not the broad exercise of supervisory power that federal appellate courts possess in regard to federal district courts. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974); *Gore v. Zant*, 706 F.2d 540, 545 (11th Cir.1983); *Stanley v. Zant*, 697 F.2d 955, 972 (11th Cir.1983). Before a state prisoner may prevail, he must show that the asserted error is of constitutional magnitude.

[5] The issue raised by Green may well reach such stature. The circumstances of the dismissal of juror Todd raise the suggestion that her refusal to impose the death penalty was a factor in her dismissal. *Green v. State*, 248 Ga. 396, 272 S.E.2d 473, 477 (1980) (Hill, J., dissenting). If that is the case, then the dismissal may well have violated *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). According to the *Witherspoon* standards, a juror's decision that death is not appropriate under the facts of a given case is not constitutionally sufficient to permit her discharge from the jury. *Witherspoon* makes clear that a juror may be excused from a jury in death-qualification procedures only if her views would compel her to vote automatically against imposition of the death penalty in all cases. The fact that juror Todd was not excluded from the jury during the pretrial death-qualification procedures indicates that her refusal to impose a death sentence in this case stemmed from her determination of the inappropriateness of such a penalty on the *facts of this case* rather than a general refusal to impose the death penalty in *any* case.

[6-8] Certainly it would violate a criminal defendant's *due process* rights were a court to dismiss a juror because of her refusal to impose the death penalty in a given case. Trial courts have discretion to dismiss ill jurors, but there is no discretion whatever to dismiss such a juror who is not in fact ill or otherwise incapacitated. The *Witherspoon* dimension of this case indicates that the trial court had a constitutional duty to adequately investigate the need for a discharge prior to dismissing juror Todd. This is especially true because Todd had already actively participated in the jury's deliberations. In such a case, a court's acceptance of ambiguous statements of a foreperson cannot, standing alone, be deemed sufficient.

Our difficulty is that to date no court has made findings of historical fact necessary to resolve Green's constitutional claim. Find-

sage of specific historical facts are entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *Moore v. Kemp*, 824 F.2d 847, 722–23 (11th Cir.1978). Such facts include "a recital of external events and the credibility of their narrators . . . ." *Townsend v. Sain*, 372 U.S. 293, 310 n. 6, 83 S.Ct. 745, 756 n. 6, 9 L.Ed.2d 770 (1963), *quoting Brown v. Allen*, 344 U.S. 443, 506, 73 S.Ct. 397, 445, 97 L.Ed. 469 (1953) (opinion of Frankfurter, J.). Specifically, we do not know whether juror Todd was so ill that she was unable to continue deliberations. If she was so incapacitated and if a hearing would have revealed that fact to the trial court, then Green cannot complain that he was prejudiced by the court's failure to hold a hearing. At the other extreme, if a hearing would have revealed that Ms. Todd was clearly able to continue as a juror, then failure to hold the hearing raises the possibility of potentially fatal prejudice.

[9, 10] The primary responsibility for factfinding resides with the state court. Where facts necessary to support a constitutional claim have not been adequately developed in the state courts, however, a federal evidentiary hearing is necessary. *Gaines v. Fortenberry*, 661 F.2d 496, 500–01 (5th Cir.1981) (en banc). In *Townsend v. Sain*, the United States Supreme Court delineated the circumstances in which a federal evidentiary hearing is mandatory. The *Townsend* Court held that a federal evidentiary hearing is required whenever "the merits of the factual dispute were not resolved in the state hearing." 372 U.S. at 313, 83 S.Ct. at 757. Thus, the initial task of the federal court is to determine whether the state court made factfindings upon which the federal court may properly review the constitutional claims of state prisoners. There "cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant." *Id.* at 312–14, 83 S.Ct. at 757. The question of whether factfindings were actually made by the state court is a threshold inquiry. This inquiry must occur prior to any discussion of the presumption of correctness given to factual determinations made by state courts and before examination of the six particularized circumstances which warrant an evidentiary hearing set out in *Townsend*, 372 U.S. at 313, 83 S.Ct. at 757, and more recently discussed by this court in *Coleman v. Zant*, 708 F.2d 541, 545–49 (11th Cir.1983) and *Thomas v. Zant*, 697 F.2d 977 (11th Cir.1983).

[11, 12] State court findings of primary historical fact may be express or implied. While express findings are of course preferable, they are not necessary. "[I]f no express findings of fact have been made by the state court, the District Court must initially determine whether the state court has impliedly found material facts." *Townsend v. Sain*, 372 U.S. at 314, 83 S.Ct. at 757. In the latter case the federal court must "reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia." *Id.* It is also possible to infer factfindings from clearly articulated or well settled legal principles relied on by the state court. This same may arise in three contexts: the record may clearly reveal that the state court applied the correct legal standard, or it may reveal that it applied the incorrect legal standard, or it may not reveal the standard applied by the state court. Factual reconstruction may be possible in the first two instances; it is most difficult in the third, unless the relevant legal principle is particularly well settled. *See generally* Wright & Sokaer, Federal Habeas Corpus for State Prisoners: *The Allocation of Fact-Finding Responsibility*, 75 Yale L.J. 895, 906–40 (1966).

In the present case the state habeas court found only that the trial court "made a proper investigation of a sick juror who had an epileptic seizure during the deliberation of the jury as reflected by the record at page 1,136 and replaced this juror with the first alternate. This was a matter that addressed itself to the discretion of the judge and his actions were a proper exercise of those discretions." The issue for us is whether this statement compels the conclusion that the state court made a finding of

fact that juror Todd was too ill to continue as a juror. The court's order and result supports either of two rival interpretations. On the one hand, the court might have found that Todd's affidavit was not credible. On the other hand, the court might have concluded that even if the affidavit was taken as true, Green had failed to sustain his claim of a constitutional violation. The difference is crucial to the scope of our review: the former is presumptively correct but we are not bound by the latter.

We are reluctant to choose between these possible interpretations of the state court's order because the court did not articulate the legal standard it was applying.

Reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances the District Court cannot ascertain whether the state court found the law or the facts adversely to the petitioner's contentions. Since the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the facts, a hearing is compelled to ascertain the facts.

Townsend v. Sain, 372 U.S. at 314, 83 S.Ct. at 757.

[13] Even when the state court does not articulate the legal principle it is using, federal courts may "properly assume that the state trier of fact applied correct standards of federal law to the facts" absent indicia of unreliability. *Id.* at 315, 83 S.Ct. at 758. There are two indicia of unreliability in this case. First, there is no clear settled standard governing the need for a hearing prior to dismissing an allegedly ill juror. "If the correct standard is well settled, it is proper to assume it was applied" by the state court. Wright & Sokaer, *supra* at 940. Conversely, in the absence of such a legal standard, it is of increased importance that the state court articulate the theoretical basis of its decision.

Second, the state court stated in fact that juror Todd had become incapacitated by an "epileptic seizure." Nothing in the record suggests that Todd was stricken with epilepsy, but it is clear that another juror in this case suffered an epileptic seizure after the period of deliberations had begun. On the day after deliberations began at the guilt-innocence phase, one of the jurors had a seizure in the motel where the jurors were staying. Bailiffs and the sheriff spoke by telephone with the juror's family and his physician. In their discussions with the juror's family the bailiffs were told that the juror "would not remember having a seizure this morning." The trial judge, after hearing the sheriff's recounting of the statements of the juror's family and physician, allowed the juror to continue with deliberations. This incident was entirely separate from the one involving juror Todd.

[14, 15] Thus, we cannot conclude that the state habeas court made a finding of fact that juror Todd was unable to continue with deliberations. Similarly, the Georgia Supreme Court did not make findings of fact. Such findings would be entitled to a presumption of correctness. For purposes of the 28 U.S.C. § 2254(d) presumption it does not matter whether the state trial court or appellate court is the factfinder. *Sumner v. Mata*, 449 U.S. 539, 545–48, 101 S.Ct. 764, 768–69, 66 L.Ed.2d 722 (1981); *Moore v. Zant*, 696 F.2d 940, 947 (11th Cir. 1983). The Georgia Supreme Court opinion, however, makes it clear that the crucial factual findings were not made.

During deliberations, a juror factual and the trial judge questioned the foreperson of the jury as to the physical status of the ill juror. The foreperson answered that the juror was physically and emotionally unable to continue and that the juror had requested to be relieved. The foreperson also told the court that from her personal observation the juror was unable to continue. The trial court excused the juror, and substituted, without objection, the first alternate. Appellant alleges error and argues that the trial court should have questioned the ill juror itself. We do not agree.

Such matters are necessarily within the discretion of the trial court and no abuse of discretion has been shown. The substi-

cution of the alternate juror was proper. *Tanner v. State*, 242 Ga. 427, 249 S.E.2d 208 (1978); Code Ann. § 59-910. Enumeration of error 10 is without merit. *Green v. State*, 246 Ga. at 668-64, 272 S.E.2d 472 at 480.

[16] Because material facts pertaining to Green's federal constitutional claim were not adequately developed in the state court, we conclude that an evidentiary hearing and appropriate findings of fact are necessary and we remand for that purpose. Fact finding is the basic responsibility of the district courts, rather than the appellate courts. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 1791-92, 72 L.Ed.2d 66 (1982); *DeHarve v. United States*, 415 U.S. 449, 450, 94 S.Ct. 1160, 1161, 39 L.Ed.2d 501 (1974).

REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH INSTRUCTIONS.

and permanent injunctions restraining defendants from withholding the benefits and clarifying former husband's right to future retirement benefits. The United States District Court for the Middle District of Alabama, Truman M. Hobbs, *J.*, treating defendants' motions to dismiss as ones for summary judgment, granted those motions. Former husband appealed. The Court of Appeals affirmed on basis of reasons set forth in the District Court's memorandum opinion, holding that Tennessee state court injunction order, under color of which pension retirement benefit payments were withheld from former husband to satisfy court-ordered alimony payments, was exempt from the alienation and assignment prescriptions of ERISA.

Affirmed.

Appendix C

Order in Green v. Zant, No. 82-161-2-MAC, entered January 13, 1984

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

ROOSEVELT GREEN, JR.,
Petitioner,

vs.

WALTER D. ZANT,
Respondent.

CIVIL ACTION NO. 82-161-2-MA

FILED

JAN 13 1984

Mary B. Owens, U.S. District Court
MIDDLE DISTRICT OF GEORGIA

OWENS, District Judge:

By order dated September 19, 1983, "because material facts . . . were not adequately developed in the state court . . the Eleventh Circuit Court of Appeals remanded this case for an evidentiary hearing in this court and appropriate findings of fact pertaining to petitioner's federal constitutional claim that the discharge of juror Todd after sentencing deliberations had begun violated his constitutional rights. As the court of appeals stated:

> Petitioner contends that the trial court erred by not questioning juror Todd or further investigating her illness. Green has stated a colorable claim of constitutional magnitude. Under the peculiar facts of this capital case, Green's 'valued right to have his trial completed by a particular tribunal,' United States v. Jorn, 400 U.S. 470, 480, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971), quoting Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949), and his sixth amendment right to a fair, impartial and representative jury may well have required that the trial court investigate the need to discharge juror Todd.
>
> Georgia law provided that an alternate juror may be substituted if 'a juror . . . becomes ill, or upon other good cause shown to the court is found unable to perform his duty.' Ga.Code Ann. § 59-910. Similarly, a federal district court possesses the discretion to remove a juror when that juror's capacity to perform his duties becomes impaired. 'There must be some "sound" basis upon which the trial judge exercise(s) his discretion' to remove the juror. United States v. Rodriguez, 573 F.2d 330, 332 (5th Cir. 1978). Dismissal of a juror 'for want of any factual support, or for a legally irrelevant reason' is prejudicial. Id. In many cases the nature of the juror's inability will be evident to the court so that a hearing on the issue is unnecessary. See, e.g., Cherry v. Director, State Board of Corrections, 635 F.2d 414, 417 (5th Cir. 1981)(en banc), cert. denied, 454 U.S. 840, 102 S.Ct. 150, 70 L.Ed.2d 124 (1982). . .
>
> Where the disability of the juror is less certain or obvious, however, some hearing or inquiry into the situation is appropriate to the proper exercise of judicial discretion. See, Cherry v. Director, State Board of Corrections, 635 F.2d at 418 . . . ; United States v. Cohen, 530 F.2d 43, 48 (5th Cir.), cert. denied, 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976). . . ; United States v. Franks, 511 F.2d 25, 37 n.19 (6th Cir.), cert. denied, 422 U.S. 1042, 95 S.Ct. 2654, 45 L.Ed.2d 693 (1975). . . .
>
> When reviewing a petition for habeas corpus, however, our scope of inquiry is not the broad exercise of supervisory power that federal appellate courts possess in regard to federal district courts. Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974); Cherry v. Zant, 708 F.2d 549, 555 (11th Cir. 1983); Tyler v. Zant, 697 F.2d 955, 972 (11th Cir. 1983). Before a state prisoner may prevail, he must show that the asserted error is of constitutional magnitude.
>
> The issue raised by Green may well reach such stature. The circumstances of the dismissal of juror Todd raise the supposition that her refusal to impose the death penalty was a factor in her dismissal. Green v. State, 246 Ga. 596, 272 S.E.2d 473, 487 (1980) (Hill, J., dissenting). If that is the case then the dismissal may well have violated Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). . . .
>
> Certainly it would violate a criminal defendant's due process rights were a court to dismiss a juror because of her refusal to impose the death penalty in a given case. Trial courts have discretion to dismiss ill jurors, but there is no discretion whatever to dismiss such a juror who is not in fact ill or otherwise incapacitated. The Witherspoon dismissal of this case indicates that the trial court had a constitutional duty to adequately investigate the need for a discharge prior to dismissing juror Todd. This is especially true because Ms. Todd had already actively participated in the jury's deliberations. In such a case, a court's acceptance of ambiguous statements of a foreperson cannot, standing alone, be deemed sufficient.

> Our difficulty is that to date no court has made findings of historical fact necessary to resolve Green's constitutional claim. . . . Specifically, we do not know whether juror Todd was so ill that she was unable to continue deliberations. If she was so incapacitated and if a hearing would have revealed that fact to the trial court, then Green cannot complain that he was prejudiced by the court's failure to hold a hearing. At the other extreme, if a hearing would have revealed that Ms. Todd was clearly able to continue as a juror, then failure to hold the hearing raises the possibility of potentially fatal prejudice.
>
> The primary responsibility for factfinding resides with the state court. Where facts necessary to support a constitutional claim have not been adequately developed in the state courts, however, a federal evidentiary hearing is necessary. Chicco v. Fortenberry, 661 F.2d 496, 500-01 (5th Cir. 1981) (en banc). . . .

_____ F.2d _____. (emphasis added).

On October 24, 1983, an evidentiary hearing was held with petitioner, his attorneys, and respondent's attorneys present. The testimony of additional witnesses Judge Andrew J. Whalen, Jr. Dr. Warren R. McKay, and jury foreLady Martha Griffin McGee was received by deposition. Post-hearing proposed findings and briefs were submitted. All having been considered this court makes the following findings of fact:

The resentencing trial of petitioner started on Monday, November 5, 1979, in Monroe Superior Court and continued into Saturday, November 10th. The trial judge, Honorable Andrew J. Whalen, Jr., concluded his charge to the jury around noon and instructed the jury to begin deliberations after returning from lunch. The jurors went to lunch at 12:10 p.m., returned, and began their deliberations at 1:35 p.m. At 4:50 p.m. the jury returned to the courtroom. Before returning to the courtroom

the jurors by one secret ballot had expressed their individual views on the question of what sentence should be imposed. Ten voted for death; two voted for life. The jurors did not know how their fellow jurors voted, and no one other than the members of the jury knew that a secret ballot vote had been taken or the result thereof. Unanimity being required for a verdict, the jurors before trying to resolve their differences desired to get further instruction from the court. The trial transcript shows that the following transpired:

> BY THE COURT: Foreperson, I understand you have a question you want to ask the Court.
>
> BY THE FOREPERSON: Yes, sir, Your Honor. The question has been posed: Can a sentence be given, 'Life in prison without parole'?
>
> BY THE COURT: I regret that I am unable to answer that question. It would be error for me to attempt to give you anything in charge concerning the situation. I'm sorry but I am just simply not able to answer your question.
>
> BY THE FOREPERSON: Your Honor, may I ask a question, a point of law?
>
> BY THE COURT: Yes, ma'am.
>
> BY THE FOREPERSON: If there is a particular witness' testimony, can the Court Reporter read back the question and the answer to the Jury?
>
> BY THE COURT: Just a moment.
>
> (WHEREUPON, BENCH CONFERENCE WAS HELD BETWEEN THE COURT AND COUNSEL.)
>
> BY THE COURT: With the consent of counsel, I will ask you to inform the Court as to the name of the witness and the question which you desire to have answered and I will then ask the Court Reporter to read back the answer to that particular question.
>
> BY THE FOREPERSON: Thank you, sir. At this moment nothing specific but the question had been asked.
>
> BY THE COURT: All right, is that all?

BY THE FOREPERSON: Yes, sir.

BY THE COURT: All right, you may retire.

(WHEREUPON, THE JURY WAS ESCORTED OUT OF THE COURT-ROOM AT 5:00 P.M. TO CONTINUE DELIBERATIONS.)

(Trial Tr. p. 1135-6).

The jurors exited the jury box to their left and then went out an adjacent door that led into a hall at the end of which were stairs leading up to and an elevator that was used to take the jury up one floor to the jury room. After all of the jurors had left the courtroom and while they were all standing in the hall waiting on the elevator, juror Dorothy Mae Ponder Todd fainted and fell to the floor. Juror Todd remembers coming out of the courtroom but thereafter recalls nothing prior to a later time when she had been taken upstairs and was in a chair sitting down. (Hearing Tr. p. 17).

Juror Belle Lifsey Schell, a registered nurse for 39 years, was standing in the hall next to juror Todd. She described the happenings as follows:

> We left the Courtroom and crossed the hall and waited for an elevator and to the best of my remembernace, Mrs. Dumas [a bailiff] rang for the elevator and we were standing there waiting for the elevator to come and Dorothy was standing to my right just behind me and I heard her say, 'Mrs. Schell,' and I turned toward her and she was collapsing and she caught ahold to my shoulder and pulled me to my knees on the floor. I didn't go completely down but I kind of fell across her and I was trying at the time to keep her from falling and yet, I was trying not to fall myself, but she went down and I went down sort of over her body, just to my knees.
>
> • • •
>
> As she [Mrs. Todd] went down, as she was going down, to me it didn't look like a faint. I think of a faint as just going limp and going to the floor with a thud. She went down with jerky movement and pulling me with her which I was trying to keep my own balance. It was

> more — as a hysterical kind of an epi— le. She was muttering something but I really don't remember what she was saying because it was incoherent.
>
> Q. Mrs. Schell, in your thirty-nine years as a registered nurse, have you seen many hysterical episodes?
>
> A. I have seen a few.
>
> Q And this is how you characterize Mrs. Todd's situation?
>
> A That's the way I saw it. . . .

(Hearing Tr. p. 109-11).

Mrs. Martha Griffin McGee, the jury foreperson who now resides in Charlotte, N. C., testified by deposition. Mrs. To was right behind her when Mrs. Todd fell. Mrs. McGee describe the happenings as follows:

> . . . After we got up to file out single file to go back upstairs, we were all moved out of the courtroom and into the hallway. We were standing there waiting for an elevator and in standing there, you get the feeling that all of a sudden, that somebody has fallen. You hear a commotion. At that point, I'm in front, and I turn around, and I see Mrs. Todd on the floor; and at that point, she was in a state of emotion that she's jerking and her head is going from side to side, and her eyes — I could almost see the whites of her eyes, and she was not totally flat on her back, but she was sort of on the side, lying with her right side to me. She was muttering, and she was in a terrible state; and at that point, I knelt down and touched her on her shoulder, which would have been her right shoulder, and I hear her say, 'I can't go on,' and I touched her on her shoulder and looked at her, and she looked at me, and I said, 'Do you want to be replaced,' and her answer to me at that time, and her head is still going and moving, and she is still trembling terribly bad, and her answer is, 'Uh-huh, uh-huh, uh-huh.' And at that point, we all were moved into an elevator and sent upstairs.
>
> Q. I would like the record to reflect that the witness was demonstrating the movement, the jerking movement Mrs. Todd was making while she was on the floor. You say you knelt over Mrs. Todd and asked her did she want to continue?
>
> A. I did.
>
> Q. She responded uh-huh, uh-huh?
>
> A. She was saying uh-huh, uh-huh, uh-huh.
>
> Q. You asked did she want to be removed?

A. I asked did she want to be replaced.

Q. And she said uh-huh?

A. She said it three times.

Q. You testified you heard her say I can't go on?

A. Uh-huh.

Q. How loud a voice did she make that statement in?

A. Very quietly. Being over her, I could understand; and when I'm saying over her, I was very close to her face, and it was almost, you know, in a whisper type tone of saying this.

Q. Was that statement made loud enough for someone on the stairwell to have heard it?

A. Oh, no, no.

Q. Was it made loud enough for anyone in the courtroom to hear it?

A. No.

Q. Was it made loud enough for any of the jurors that were standing around her, not kneeling over her, to hear it?

A. I don't think so. I wouldn't think so at all.

* * *

(Dep. p. 5 & 6).

Mrs. Donna Heath, another juror, testified that while waiting for the elevator Mrs. Todd "said something, . . . reached out for Mrs. Schell and . . . fell to the ground." She was unable to understand what Mrs. Todd said when she fell. (Hearing Tr. p. 99). After Mrs. Todd fell she did not murmur say anything. Mrs. Todd was out cold. When Mrs. Todd came to she had to be helped to her feet and "someone had to support her." (Hearing Tr. p. 100).

Mrs. Emmie D. Adams, another juror, was standing in the hall and saw Mrs. Todd as she passed out. "[Mrs. Todd] was

clinging to [Mrs. Schell] and pulled her down with her. . . as she went down clinging to Mrs. Schell she was mumbling something but she was very incoherent and very hysterical and then, if I remember right, she passed out completely soon after that.

Mrs. Mary Sewell, a retired school teacher, was a bailiff. She was in the hall some five or six feet from juror Todd, then called Mrs. Fambro. She described the situation as follows:

* * *

> A. The Judge said to the jury to return to the jury room. They came out of my door which would be to the Judge's left, facing as I am now. They got into the hall. The other bailiff, a woman, rang for the elevator. I was — stepped maybe six feet, approximately that, to the other side; this door being here, I stepped this way to make room for the rest of the people in the jury, the place is small. As they got — everybody seemed so tense, including me, when the jury got outside of the courtroom, the door, I heard Mrs. Fambro say, 'Mrs. Schell.' I wasn't really looking at her but I heard her say, 'Mrs. Schell,' and when I turned around, I remember my left, I turned around in this direction and saw her topple over. She pulled Mrs. Schell down with her and Mrs. Schell, as I recall, was on a knee while Mrs. Fambro was out and when I say 'out,' she was motionless. What now seemed like an eternity, she kind of came to, I guess is a good expression and she began doing like this (demonstrating) that sort of thing and kind of murmuring and I was terribly scared because I really thought she was having a stroke.
>
> MR. HILL: Your Honor, at this point I would like the record to reflect that the witness was showing that Mrs. Todd was making jerking movements and motions while she was on the floor. It might not be apparent for the record as it is.
>
> THE COURT: Shaking, jerking movements, yes sir.
>
> A. She was rambling but her words weren't coherent so I have no idea what she said after saying, 'Mrs. Schell' and I was standing nearby.

(Hearing Tr. p. 114-15).

The only person in position to hear and understand what Mrs. Todd said as she fell to the floor was Mrs. McGee,

the jury foreperson. As already indicated, Mrs. McGee heard Mrs. Todd say, "I can't go on."

All of the jurors except Mrs. Todd were taken by the elevator or walked up the stairs to the jury room. When Mrs. Todd came to she was taken upstairs to another room.

At the time Mrs. Todd fainted the trial judge, attorneys, defendant, and court reporter were in the courtroom. By deposition the trial judge testified:

> The juror in question was a black lady. Dorothy Mae Ponder Todd was her name. As I recall it, the jury, at one point in their deliberation, wanted to ask the Court a question and I allowed them to come into the jury box. I believe, the foreman propounded a question involving a possibility of parole in the event the defendant received a life sentence: I believe that's what it was. I advised them that I could not answer that question: it would be improper for the Court to do so.
>
> The jury left the box, walked out of the courtroom into a hallway adjacent to the courtroom. In a matter of just a few moments, we heard a commotion, voices and noises coming from the corridor. One of the bailiffs or deputies came into the courtroom and informed me that one of the jurors had either fainted or collapsed in the hallway.

(Dep. p. 4 & 5).

After consulting with another superior court judge the trial judge, with the attorneys and defendant present in the courtroom, according to the trial transcript took the following action and only the following action:

> . . . AT 5:25 P.M. FOREPERSON McGEE WAS BROUGHT INTO THE JURY BOX AND THE FOLLOWING TRANSPIRED:)
>
> BY THE COURT: Let the record show that the Foreperson of this Jury, Mrs. Martha McGee, has been requested to come back into the Courtroom by the Court and the Court desires to ask a question of Mrs. McGee. Mrs. McGee, I understand that the

Juror, Dorothy Mae Ponder Todd, a few moments ago upon leaving the Courtroom fainted in the corridor, is that correct?

BY FOREPERSON McGEE: Yes, sir.

BY THE COURT: And you have stated to me that upon returning to the Jury room, this Juror is in your opinion incapable of continuing deliberation in this case because of the fact that she is physically and emotionally unable to continue and participate in the deliberation of this Jury, is that true?

BY FOREPERSON McGEE: Yes, sir, it is.

BY THE COURT: And has this person requested of you that she be released from further service?

BY FOREPERSON McGEE: Yes, sir.

BY THE COURT: In your opinion, from having examined her, is she in this condition?

BY FOREPERSON McGEE: Yes, sir, she is.

BY THE COURT: You may go back to the Jury room.

BY FOREPERSON McGEE: Thank you.

(WHEREUPON, THE FOREPERSON WAS ESCORTED BACK TO THE JURY ROOM BY THE BAILIFF AND THE FOLLOWING TRANSPIRED:)

BY THE COURT: Sheriff Bittick, I'm going to direct you to remove Juror Dorothy Mae Ponder Todd from the Jury room. This is being done at her request and upon the advice and at the request of the Jury Foreperson, Mrs. McGee, conveying this Juror to a doctor or some medical facility for the purpose of having her examined and receiving such treatment as she might require.

BY SHERIFF BITTICK: Yes, sir.

BY THE COURT: Now, bring that first alternate juror into the Courtroom, please. Oliver Davis?

(WHEREUPON, ALTERNATE JUROR #1, OLIVER DAVIS, WAS BROUGHT INTO THE COURTROOM AND THE FOLLOWING TRANSPIRED:)

BY THE COURT: Mr. Davis, you can just stand there for just a moment. As you know, you were selected as the first alternate juror in this case. One of the jurors, Dorothy Mae Ponder Todd, has become ill and is unable to continue her service in this case.

BY JUROR DAVIS: Yes, sir.

BY THE COURT: She has been excused from further service due to her physical and emotional condition and therefore, it will be necessary for the Court to require you to enter into the service in this case as an active juror. You will now go to the Jury room and join the other jurors and from this point forward, you will participate in their deliberation and join in the verdict that is ultimately made in this case.

(WHEREUPON, JUROR DAVIS LEFT THE COURTROOM AND WAS ESCORTED BY THE BAILIFF TO THE JURY ROOM AT 5:40 P.M. AND DELIBERATIONS CONTINUED. . .)

(Trial Tr. p. 1136-38).

Petitioner was represented by three attorneys. Neither of them objected to the court's action or suggested any alternati procedure.

Had the trial judge conducted a further hearing and interviewed Mrs. Todd as soon as she recovered he would have learned that Mrs. Todd did not believe she was able to then continue to serve as a juror. (Hearing Tr. p. 38). Had the trial judge interviewed other jurors such as those presented to this court he would have learned the detailed facts as recited by this court, would have concluded that Mrs. Todd was ill and unable to then continue to serve as a juror, would have sent her to the hospital — as was done — and would have replaced her with an alternate juror.

Had the trial judge sent the juror to the hospital emergency room and requested that a report of her condition be given to him before he took any action to replace her with an alternate juror, the examining physician would have advised him that Mrs. Todd had an anxiety reaction, needed valium, and should be sent home to rest. He, if asked, would have advised that her condition and the necessary valium would render her incapable of further serving as a juror that evening.

These facts permit no other conclusion but that there existed a sound basis for the exercise of the trial judge's discretion in replacing Mrs. Todd with an alternate juror. Nevertheless, the court feels constrained to emphasize three particular points which further serve to illustrate that the trial judge acted correctly and without any impermissible moti

One, even though juror Todd stated in her affidavit (to which the court of appeals gave great emphasis) that she had every intention of continuing to serve as a juror, it is clear from her testimony before this court at the October 24th heari as well as the deposition testimony of foreperson McGee that Mrs. Todd had no intention, nor was she capable, of continuing as a juror on the afternoon of November 10, 1979.

Two, it must be mentioned in this case that the trial judge had ordered the jury to be sequestered and that on Saturday, November 10, 1979, these jurors had been separated from their homes and families for almost six days. In such a situation a trial judge, in contemplating what to do with a juror who has become ill and is unable to continue deliberati that day, feels a sense of urgency which does not otherwise exist to replace the stricken juror with an alternate.

Third, in exercising his discretion to replace juror Tod with alternate juror Davis it is undisputed in the evidence c record that the trial judge could not possibly have known th opinion of either of these individuals toward imposing the death penalty. Furthermore, neither the attorneys nor Mrs. Todd's fellow jurors had any idea as to how she stood

insofar as whether to sentence petitioner to life or death. Accordingly, Mrs. Todd's feelings, known only to her, as to whether petitioner should receive the death penalty, played absolutely no part in the trial judge's decision to replace he with Mr. Davis.

Were this court to be charged with the responsibility of determining whether the trial judge had a sound basis for exercising his discretion to replace juror Todd, this court, without hesitation, would find that he did. The detailed fact as developed by this court upon a careful consideration of the live testimony of Mrs. Todd (now Mrs. Fambro), fellow jurors Donna Heath, Emmie D. Adams, and Belle Schell, bailiff Mary Sewell, district attorney E. Byron Smith, and medical expert Dr. Richard T. Oliver as well as the deposition testimony of Judge Andrew J. Whalen, foreperson Martha McGee, and medical expert Dr. Warren R. McKay establish that Mrs. Todd was in fact unable to continue deliberations on Saturday, November 1 Accordingly, petitioner cannot constitutionally complain that he was prejudiced by the trial court's failure to hold a hear since said hearing would have supported the action taken by the trial judge.

CONCLUSION

Pursuant to the September 19, 1983, order of the Eleven Circuit Court of Appeals, this court hereby certifies that t

constitutes its findings of fact[1] with respect to petitioner's claim that the trial judge's dismissal of juror Todd after sentencing deliberations had begun violated his constitutional rights.

The clerk is hereby directed to forward said findings together with the record of the proceedings before this court wi dispatch to the court of appeals.

SO ORDERED, this 13th day of January, 1984.

Wilbur D. Owens, Jr.
United States District Judge

[1] This court must express its concern that some of its findings of fact differ with what the court of appeals in its September 19th order characterized as "undisputed facts." This court can only assume that the court of appeals would have found differently had the information presently before this court been available to the court of appeals at the time of its order.

Appendix D

Opinion in Green v. Zant, 738 F.2d 1529 (11th Cir. 1984)
rendered July 30, 1984

Roosevelt GREEN, Jr.,
Petitioner-Appellant,

v.

Walter D. ZANT, Respondent-Appellee.

No. 82-8772.

United States Court of Appeals,
Eleventh Circuit.

July 30, 1984.

Following remand, 715 F.2d 551, the United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., Chief Judge, denied habeas writ, and petitioner appealed. The Court of Appeals,

1. Habeas Corpus ⇐55.5(12)

District court did not err in accepting foreperson's version of events surrounding collapse of juror, notwithstanding inconsistent testimony by other witnesses, where foreperson's testimony appeared generally consistent with recollections of other witnesses.

2. Jury ⇐149

Where juror who collapsed would not have been able to continue as juror on day that jury returned to its deliberations, trial judge had sound basis for decision to discharge juror and no prejudice resulted to defendant from trial judge's failure to question juror personally before dismissing her.

3. Habeas Corpus ⇐30(3)

Where jury was presented with indictment charging malice murder, was carefully instructed on elements of such offense and there was evidence in record to support

guilty verdict, jury's decision finding defendant guilty of malice murder foreclosed consideration of his argument that Eighth Amendment would not permit death penalty to be imposed on one who aids and abets felony in course of which murder is committed by others but who does not himself kill, attempt to kill, or intend that killing take place or that lethal force will be employed. U.S.C.A. Const.Amend. 8.

4. Jury ⇐=108

Exclusion of potential jurors who made it clear that they would not consider imposing death penalty under any circumstances was proper.

5. Habeas Corpus ⇐=30(3)

Habeas petition could not be grounded on denial of opportunity to present mitigating evidence where petitioner had been deprived of such testimony not as result of actions of district attorney or rulings by court, but because defense counsel failed to comply with reasonable instructions issued by trial judge earlier in proceedings.

6. Criminal Law ⇐=641.13(1)

Constitutionally ineffective assistance of counsel would not be established merely by complaints against defendant's counsel. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐=641.13(2, 6)

Defense counsel's strategic decision to place principal emphasis on argument that defendant was less culpable than his coaccused, and decision to forego extensive investigation into defendant's background, did not constitute ineffective assistance of counsel at sentencing trial. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐=1166.11

Where juror who collapsed would have been discharged by trial judge in any event, defendant was not prejudiced as result of his counsel's failure to request opportunity to question her.

9. Criminal Law ⇐=874

Object of jury poll is to ascertain that verdict agreed upon in jury room, is still unanimous verdict.

10. Criminal Law ⇐=874

Unless trial judge's interrogation during jury poll serves to coerce reluctant juror into changing his vote, any formulation of polling question that ascertains that verdict agreed upon in jury room remains unanimous verdict is permissible.

11. Criminal Law ⇐=912½

Under Georgia law, fact that one juror in capital case intimates that he dissents from published verdict of jury does not automatically require that alternative verdict be entered.

12. Criminal Law ⇐=874

Where juror intimates during polling of jury that he dissents from published verdict of jury, trial judge may take appropriate steps, such as noncoercive questioning or directing jury to retire for further deliberations, to ascertain whether juror actually intended to dissent from published verdict.

13. Homicide ⇐=254

During resentencing trial following murder conviction, introduction into evidence of desiccated remains of victim's ear and other fragments of bone and skin, which were found on ground near her corpse, was permissible.

14. Criminal Law ⇐=656(7)

During defendant's closing argument as cocounsel in his own behalf under Georgia law, his right to remain silent under Fifth and Fourteenth Amendments was not infringed by trial judge's statement that defendant had not testified and thus could not make unsworn statement to jury concerning his state of mind. O.C.G.A. § 17-10-30(b)(7); U.S.C.A. Const.Amends. 5, 14.

15. Homicide ⇐=254

Where jury in murder case based death sentence on finding of other, proper, aggravating circumstances, there was no constitutional error in permitting state to introduce court records of defendant's prior convictions for burglary and assault with intent to rob as aggravating evidence.

16. Criminal Law ⇐=1208.1(5)

Under Georgia law, sexual abuse may constitute "torture" for purposes of finding aggravating circumstances under statute governing procedures for imposition of death penalty. O.C.G.A. § 17-10-30(b)(7).

See publication Words and Phrases for other judicial constructions and definitions.

17. Homicide ⇐=354

In capital murder prosecution, without implicit refusal by first sentencing jury to find defendant guilty of rape for purpose of finding aggravating circumstances under Georgia statute governing procedures for imposition of death penalty, there was no constitutional barrier to admitting evidence of alleged rape at his second sentencing trial. O.C.G.A. § 17-10-30(b)(7).

18. Criminal Law ⇐=1208.1(5)

Aggravating circumstances are procedural standards designed to control jury's discretion in capital cases in order to ensure against capricious and arbitrary enforcement of death penalty. O.C.G.A. § 17-10-30(b)(7).

19. Criminal Law ⇐=1208.1(5)

Under Georgia law, jury has power to decline to impose death penalty even if it finds that one or more statutory aggravating circumstances are present. O.C.G.A. § 17-10-30(b)(7).

20. Constitutional Law ⇐=278(4)

Defendant's Fourteenth Amendment right to fair trial at sentencing phase was not violated by trial judge's refusal to instruct jury that a defendant is presumed innocent of aggravating circumstances. U.S.C.A. Const.Amend. 14.

21. Criminal Law ⇐=884

Under Georgia law, once jury has found that given case is one of limited number in which death penalty is possible sanction, its discretion in selecting capital punishment is absolute. O.C.G.A. § 17-10-30(b)(7).

John Charles Boger, New York City, for petitioner-appellant.

Virginia H. Jeffries, Wm. B. Hill, Jr., Asst. Attys. Gen., Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

VANCE, Circuit Judge:

This capital case is again before this court following a limited remand for an evidentiary hearing concerning the discharge of a juror after the jury had commenced its deliberations. Since the facts and procedural background of this case are set forth in this court's earlier opinion, *Green v. Zant*, 715 F.2d 551 (11th Cir.1983) [*Green I*], we turn directly to a consideration of the issues raised by petitioner. We conclude that all of petitioner's claims are without merit and therefore affirm the judgment of the district court denying the writ.

I. THE DISMISSAL OF JUROR TODD

When this appeal was first argued, petitioner contended that one of the jurors at his resentencing trial, Mrs. Dorothy Mae Ponder Todd, had been replaced by the trial judge without an adequate inquiry into her ability to continue. Specifically, petitioner alleged that the jury had returned to the courtroom after several hours of deliberations to ask the judge whether petitioner could be sentenced to life imprisonment without possibility of parole. The judge informed the jury that he could not respond to this question, and the jurors filed out into the hallway to return to the jury room. At this point, according to the testimony of petitioner's counsel and a jury consultant retained by the defense, Mrs. Todd apparently experienced an hysterical reaction and fell to the floor, repeatedly crying "I can't do it!" in a voice that was audible within the courtroom itself. Following a colloquy between the trial judge and the jury foreperson, Mrs. Martha McGee, Mrs. Todd was discharged and replaced by an

alternate. Petitioner also produced an affidavit from Mrs. Todd in which she stated that she had been one of two jurors holding out against the death penalty, that she "had every intention of continuing as a juror" even after her collapse, and that the trial judge had not questioned her to ascertain her condition before ordering her replacement.[1]

On the basis of these allegations, this court noted that "Green has stated a colorable claim of constitutional magnitude.... The circumstances of the dismissal of juror Todd raise the suggestion that her refusal to impose the death penalty was a factor in her dismissal." *Green I*, 715 F.2d at 555–56. Since we concluded that neither the state habeas court nor the state supreme court had made any findings of fact on this issue, *id.* at 558, we remanded the case to the district court for an evidentiary hearing. In accordance with our instructions, the district court subsequently held a hearing and issued its findings of fact, which were certified to this court in an order dated January 13, 1984. On the basis of the extensive testimony presented at the hearing, the district court held that the facts adduced "permit no other conclusion but that there existed a sound basis for the exercise of the trial judge's discretion in replacing Mrs. Todd with an alternate juror.... Accordingly, petitioner cannot constitutionally complain that he was prejudiced by the trial court's refusal to hold a hearing...." *Green v. Zant*, No. 82-161-2-MAC, slip op. at 12–13 (M.D.Ga., Jan. 13, 1984). Petitioner challenges the district court's findings, but we conclude that they are not clearly erroneous.

Petitioner contends that the district court's findings should not withstand our scrutiny because they "necessarily rest on [the] acceptance of certain deposition testimony from foreperson Martha McGee that is not only unworthy of belief but is contradicted on key points by every other witness with knowledge of these events." Mrs. McGee testified that she was waiting for the elevator in the hallway outside the courtroom with the other jurors when Mrs. Todd suddenly collapsed.

> At that point, I'm in front, and I turn around, and I see Mrs. Todd on the floor; and at that point, she was in a state of emotion that she's jerking and her head is going from side to side, and her eyes—I could almost see the whites of her eyes, and she was not totally flat on her back, but she was sort of on the side, lying with her right side to me. She was muttering, and she was in a terrible state; and at that point, I knelt down and touched her on her shoulder, which would have been her right shoulder, and I hear her say "I can't go on," and I touched her on her shoulder and looked at her, and she looked at me, and I said, "Do you want to be replaced," and her answer to me at that time, and her head is still going and moving, and she is still trembling terribly bad, and her answer is "Uh-huh, uh-huh, uh-huh."

Mrs. McGee indicated that Mrs. Todd made these remarks "in a whisper type tone" that would not have been audible in the courtroom or even to the other jurors standing around in the hallway.

[1] Petitioner charges that Mrs. McGee's testimony is not worthy of credence, noting that no other witness testified to observing Mrs. McGee bending over Mrs. Todd as she was lying on the floor, that no other witness recalled Mrs. Todd saying "I can't go on," and that several of the witnesses indicated that Mrs. Todd was unconscious while lying on the ground. We must expect some inconsistencies, however, when witnesses are interrogated in exhaustive detail concerning their recollections of a brief and startling incident that occurred almost four years earlier. The testimony of several other witnesses supplied at least circumstantial support for Mrs. McGee's account. Two of the other jurors, Mrs. Emmie Adams and Mrs. Belle Schell, as well as one of the bailiffs, Mrs. Mary Sewell, recalled that Mrs. Todd was mumbling or muttering something after she fell to the floor. While they all stated that they could not understand what she was saying, this would be consistent with Mrs. McGee's statement that Mrs. Todd was speaking in an almost inaudible voice. Mrs. Sewell's testimony indicated that she believed Mrs. Todd had first passed out and then had come to and begun rolling around on the floor, which would explain why some witnesses recalled Mrs. Todd as unconscious while others reported her in a semi-conscious or hysterical state. Mrs. McGee's testimony therefore appears generally consistent with the recollections of the other witnesses. Under these circumstances we clearly cannot hold that the district court erred in accepting her version of events.

Other testimony at the evidentiary hearing buttresses the district court's conclusion that the trial judge did not abuse his discretion in dismissing Mrs. Todd. The trial judge himself testified that he had no way of knowing Mrs. Todd's position in the sentencing deliberations, and this claim was supported by Mrs. McGee's testimony. In our initial opinion, we took note of the possibility that the trial judge might have been aware of Mrs. Todd's position in the jury's deliberations. This view was based on petitioner's claim that Mrs. Todd fell to the floor crying "I can't do it!" in a voice that was audible within the courtroom. This claim was completely discredited at the evidentiary hearing, however. The only witnesses who took this view were petitioner's defense counsel and a jury consultant working for the defense team; the other witnesses either indicated that Mrs. Todd said something else or stated that they were unable to understand her, although the other jurors and the bailiffs were much closer than those still inside the courtroom.

[2] Once the suggestion that the trial judge knew of Mrs. Todd's position on petitioner's sentence is dispelled, we are left with no other reason for his actions than his apparent wish to proceed expeditiously with the jury's deliberations. The jury in fact returned to its deliberations after Mrs. Todd was discharged and succeeded in reaching a verdict later that evening. Since Mrs. Todd herself testified that she would not have been able to continue as a juror at that time, we conclude that the trial judge had a sound basis for his decision to discharge Mrs. Todd and that no prejudice resulted to petitioner from the trial judge's failure to question Mrs. Todd personally before dismissing her.

II. THE *ENMUND* ISSUE

[3] Petitioner asserts that the imposition of the death penalty in his case is unconstitutional under the principles set forth by the Supreme Court in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). In *Enmund*, the Supreme Court held that the eighth amendment does not permit the death penalty to

1. In her affidavit, juror Todd stated:
   I reside at 71 Jones Street, Forsyth, Georgia.
   I am employed by the Bibb Company in Forsyth.
   I was selected to serve as a juror in the case of the *State of Georgia v. Roosevelt Green* in November of 1979, in the resentencing trial.
   The only issue to be determined was whether Mr. Green should receive a life sentence or the death penalty.
   I heard testimony as a juror for the entire sentencing trial as charged by the Court.
   After a lunch break on Saturday, November 10, we began deliberations.
   I heard all the evidence and participated fully in the deliberations. A secret ballot was taken by the foreperson. The vote was 10-2 in favor of the death penalty. I voted against the death penalty.
   Just before 5:00 p.m., the jury returned to the courtroom with two questions for the Court concerning whether life imprisonment means no parole and whether it was possible to have testimony of a witness read to us.
   After the judge said what he did, I felt that the other juror would be more likely to give the death sentence because he thought that Roosevelt Green would be paroled.
   We then went out of the courtroom. Before I got on the elevator, I collapsed. I had never collapsed before in my entire life.
   I had every intention of continuing as a juror. I don't remember ever making any statements to anyone asking to be taken off the jury.
   The judge never asked me personally whether I could continue. I was capable of continuing to serve as a juror and I'm sure that I would have standed [sic] firm with my convictions.

be imposed on a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.* at 797, 102 S.Ct. at 3376. Petitioner claims that he falls within the *Enmund* rule because witness Thomas Pasby testified that Moore claimed to have committed the murder after sending petitioner away "to get some gas," and that petitioner "didn't know he was going to shoot her."

This case is distinguishable from *Enmund* in that it was presented to the jury on a malice murder theory, rather than as felony murder. The prosecutor contended in his closing argument that Green fired the fatal shots, noting that Green was driving the victim's car and was in possession of the murder weapon when he was arrested in South Carolina, and that he had told his girl friend that "he shot or he killed a girl somewhere in Georgia." The trial court instructed the jury on the elements of malice murder and also informed them that they could not find the defendant guilty unless they found "that he was present at the scene of the alleged crime and his presence is an essential element of the crime as alleged in the indictment." Even Pasby's testimony indicated that Green had been a full participant in the robbery of the Majik Market where the victim, Teresa Allen, worked as a cashier, as well as in her subsequent abduction and rape, and that he later assisted Moore in disposing of her corpse. The jury in this case was squarely presented with an indictment charging malice murder; it was carefully instructed on the elements of the offense; and there was evidence in the record to support its verdict. We must therefore conclude that the jury's decision finding Green guilty of malice murder forecloses us from considering petitioner's *Enmund* argument.

III. THE *WITHERSPOON* ISSUE

[4] Petitioner next contends that six potential jurors were improperly excused during the voir dire preceding his second sentencing trial because they did not indicate that they were automatically opposed to the imposition of capital punishment in all circumstances, as required by *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The record clearly demonstrates, however, that the court committed no error. Jurors Benjamin Hill, Shirley Alford, Lucy Crowder, Lessie Passmore, Jr., and Grady Watson all answered affirmatively when the trial judge asked, "Are each of you saying that no matter what the evidence showed, no matter what type of crime it was, no matter how it occurred or anything about it, that there is no possible way in this world that you would ever vote to impose the death penalty?" All five of these jurors were then subjected to further, dogged interrogation by defense counsel, which failed to elicit any suggestion that they were other than unalterably opposed to the imposition of the death penalty under any circumstances.

Petitioner focuses most of his attention on the case of juror Fannie Mae Watts, who did not step forward when the prosecutor first put the *Witherspoon* question to the panel. Mrs. Watts was also questioned extensively after she subsequently indicated that she did not believe in the death penalty, and in response to defense counsel's inquiry, "Do you feel there would ever be a circumstance, any circumstance at all under which you would even be able to consider a death penalty?" she replied, "No, I don't." Because all six of these jurors made it clear that they would not consider imposing the death penalty under any circumstances, their exclusion was proper under the principles set forth in *Witherspoon*.

IV. THE MITIGATING EVIDENCE ISSUE

[5] Petitioner further alleges that he was denied the opportunity to present important mitigating evidence as a result of the district attorney's refusal to cooperate in taking the deposition of Father William James, a Montgomery priest who had been the head of a foster home where petitioner once lived. The facts surrounding this contention appear to be as follows. At the beginning of the trial, defense counsel notified the court that he desired to call Father James to supply mitigating testimony, but suspected that he might be unavailable as a witness except on a date when the prosecution would still be presenting its case in chief. The trial judge indicated that he had some concerns about disrupting the orderly flow of the evidence and also wanted to ensure that the state had an adequate opportunity to cross-examine Father James. He then announced, "Let's do it like that, if the state's not through, I will send the jury to the room and put him up and let him say what he wants to say and let him be cross examined and then at the proper time, I will let you introduce that record."

Several days later, as the court prepared to adjourn for the day, defense counsel announced that he wished to "perfect the record on Father James." He then informed the court:

> Father James came to Monroe County last night and was here this morning and at lunchtime I asked the district attorney about taking this man's deposition and the district attorney retorted and responded and said that Father James could wait around like any other witnesses and he didn't care if he had to wait until next Wednesday and that he wasn't going to agree to any deposition now and Father James had to go back to his other appointment and is not available anymore ....

The record therefore clearly reveals that defense counsel failed to approach the court about excusing the jury so that Father James could testify while he was still available to do so. The trial judge's earlier remarks did not indicate that it was necessary for petitioner to secure the state's consent before proceeding to depose Father James, but simply that the judge wished to ensure the state an adequate opportunity for cross-examination. Petitioner was therefore deprived of Father James' mitigating testimony not as a result of the actions of the district attorney or any rulings by the court, but because defense counsel failed to comply with the reasonable instructions issued by the trial judge earlier in the proceedings.

This case is therefore distinguishable from the precedents cited by petitioner. In cases such as *Lockett v. Ohio*, 438 U.S. 586, 604–05, 98 S.Ct. 2954, 2964–65, 57 L.Ed.2d 973 (1978) (plurality opinion), *Goodwin v. Balkcom*, 684 F.2d 794, 798–803 (11th Cir.1982), *cert. denied*, — U.S. —, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983), *Spivey v. Zant*, 661 F.2d 464, 469–72 (5th Cir. Unit B 1981), *cert. denied*, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982), and *Chenault v. Stynchcombe*, 581 F.2d 444, 447–48 (5th Cir.1978), the issue was whether the trial court had employed jury instructions that either precluded the consideration of some types of mitigating evidence or were insufficiently clear as to the proper role of mitigating circumstances in the jury's deliberations. In *United States v. Goodwin*, 625 F.2d 693, 702–03 (5th Cir.1960), *United States v. Hammond*, 598 F.2d 1008, 1012–15 (5th Cir.), *modified*, 605 F.2d 862 (5th Cir.1979), and *United States v. Henrickson*, 564 F.2d 197, 198 (5th Cir.1977), the defendants claimed that government agents had improperly pressured potential defense witnesses to discourage their testimony at trial. Petitioner's claim is clearly not comparable to those presented by either of these two lines of cases, and we therefore conclude that his argument on this ground is without merit.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner also charges that the performance of his defense counsel at his second sentencing trial failed to meet minimum standards of constitutional acceptability. Specifically, he contends that his counsel failed to conduct an adequate investigation to locate witnesses who might be able to offer mitigating evidence, that he failed to act to preserve the mitigating testimony that Father James was prepared to offer, that he failed to request a voir dire of juror Todd to determine her fitness to continue on the jury after her collapse, and that he

failed to object to the improper questions employed by the trial judge when one of the jurors indicated during a poll of the jury that he did not support the death sentence imposed on petitioner.

[6] The Supreme Court has recently clarified the law governing ineffective assistance of counsel in *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Court established a two-prong test for analyzing such challenges. First, the defendant must establish that his counsel's performance "fell below an objective standard of reasonableness." *Id.* at —, 104 S.Ct. at 2065. Once that threshold is crossed, the defendant must then demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at —, 104 S.Ct. at 2068. Our own cases have established that "[e]ffective assistance does not mean errorless assistance, nor counsel judged ineffective by hindsight," *Goodwin v. Balkcom*, 684 F.2d at 804, and our determination of whether petitioner was denied effective assistance "must be based on the totality of circumstances in the entire record rather than on specific actions." *United States v. Gibbs*, 662 F.2d 722, 730 (11th Cir.1981). Thus, even if we agree that any of petitioner's complaints against his counsel is well founded, this does not necessarily mean that constitutionally ineffective assistance has been established.

With regard to the first point raised by petitioner, the Supreme Court held in *Strickland v. Washington* that "counsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary." — U.S. at —, 104 S.Ct. at 2066. The record does not contain direct testimony from petitioner's defense counsel concerning his trial strategy, but it is apparent from his arguments on the initial direct appeal and at the resentencing trial that he sought to persuade the jury that petitioner was less culpable in the abduction, rape, and murder of Teresa Allen than his co-accused, Carzell Moore. For example, defense counsel succeeded in winning a reversal of petitioner's initial death sentence from the United States Supreme Court on the grounds that the trial judge had improperly excluded the testimony of Thomas Pasby, which indicated that Moore had murdered the victim while Green was absent from the scene. *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). At the resentencing trial, defense counsel stressed this point and emphasized other evidence suggesting that his client had played a secondary role, such as forensic testimony indicating that only Moore had raped the victim and the absence of any footprints in the area around the victim's body that could be traced to petitioner's shoes. In his closing argument, defense counsel contended that his client "should not be made to die for the sin of another.... He didn't kill this girl. He didn't shoot her. The other guy shot her. He didn't know he was gonna shoot her. The other man knew."

[7] Thus, it appears that petitioner's counsel made a strategic decision before the resentencing trial to place his principal emphasis on the argument that petitioner was less culpable than his co-accused, rather than relying heavily on "general affirmations from family members and friends that [the defendant] had been, at a time remote from the events giving rise to the charge, a basically good and responsible child and young adult." *Stanley v. Zant*, 697 F.2d 955, 967 (11th Cir.1983). In view of the admissions favorable to his client that petitioner's counsel succeeded in extracting from Pasby and the state's forensic witnesses, we cannot say that this choice was an unreasonable one under the circumstances, and we therefore do not believe that the decision to forego an extensive investigation into petitioner's background constituted ineffective assistance of counsel. Similarly, although we have noted above that we believe that defense counsel was responsible for the failure to preserve the supposedly mitigating testimony that could have been offered by Father James, such evidence was not essential to counsel's overall strategy, and we can infer that it would have been largely cumulative of that presented by petitioner's mother and sister, who did testify about the circumstances of his childhood and young adolescence.

[8] The third point raised by petitioner concerns his counsel's failure to request a voir dire of juror Todd following her collapse in the hallway. We have addressed the circumstances surrounding the dismissal of Mrs. Todd at some length above, and it is clear that a voir dire would have revealed that she felt unable to continue with deliberations for at least the remainder of that evening. Because Mrs. Todd would therefore have been discharged by the trial judge in any event, petitioner plainly was not prejudiced as a result of his counsel's failure to request an opportunity to examine her.

Finally, petitioner contends that his counsel erred by failing to object to allegedly improper questions employed by the trial judge during the post-verdict poll of the jury. During the initial poll of the jury, the following exchange took place:

> BY THE COURT: Mr. Mobley, Samuel Mobley. You have heard the verdict read, Mr. Mobley, was this your verdict in the jury room?
>
> BY JUROR MOBLEY: Yes, it was, your honor.
>
> BY THE COURT: Is this your verdict now?
>
> BY JUROR MOBLEY: No, it's not, your honor. I cannot do it.

The trial judge immediately directed the jury to return to the jury room. Subsequently, the court examined bailiff Mary Sewell, who reported, "When the jurors got back to the jury room, Mr. Mobley, the black, young man said, 'I did not know what was going on. I don't know—I didn't know what polling the jury was.'" According to Mrs. Sewell, Mobley added that "he felt when they asked him, whatever the question was, that they wanted to know if he was responsible for the whole thing. Somehow he got the idea that the question was directed to him as a person, 'Did you do this?'" The trial judge then recalled the jury and explained that "[t]o poll the jury simply means to ask the juror in open court, after that verdict has been published in court, whether or not that is his or her verdict." The trial judge then proceeded to poll the jury by saying to each juror, "You have heard the verdict published. Is this your verdict?" All of the jurors responded affirmatively.

[9, 10] Petitioner asserts that his counsel erred by failing to object to the trial judge's use of the single question, "Is this your verdict?" rather than asking "whether the verdict was both the juror's verdict in the jury room *and* was still his verdict," and by failing "to invoke settled Georgia law, under which a nonunanimous verdict in a capital case automatically requires a life sentence." We are not impressed by either contention. Neither the Georgia nor the federal courts have mandated that any particular phrasing be used by a trial judge in polling a jury. Judge Webb of the Georgia Court of Appeals noted in *White v. Seaboard Coast Line Railroad*, 139 Ga. App. 823, 229 S.E.2d 775, 777 (1976), that "[t]here is no uniformity in, nor statutory authority for, polling a jury," and he proceeded to illustrate the point by citing a variety of formulations which have been approved by Georgia courts over the years. A similar lack of uniformity is apparent in the federal courts. *See, e.g., United States v. Millican*, 600 F.2d 273, 278 (5th Cir. 1979), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1274, 63 L.Ed.2d 598 (1980) ("Is this your verdict and the verdict of the jury?"); *United States v. Sexton*, 456 F.2d 961, 962 (5th Cir.1972) ("Was it your verdict?"); *Jackson v. United States*, 386 F.2d 641, 642 (D.C.Cir.1967) ("What say you as to the defendant on count one of the indictment?"). The object of a poll of the jury is to ascertain that the verdict agreed upon in the jury room is still the unanimous verdict of the jury. *United States v. Edwards*, 469 F.2d 1362, 1366 (5th Cir.1972). Unless the trial judge's interrogation serves to coerce a reluctant juror into changing his

vene, *Sartore*, 456 F.2d at 966, any formulation that meets that end is permissible.

[11, 12] Petitioner's trial counsel also did not necessarily err by failing to request that a life sentence be entered against his client after the initial poll indicated that Mobley did not support the verdict. The fact that one juror intimates that he dissents from the published verdict of the jury does not automatically require that the alternative verdict be entered. The courts have traditionally recognized that jurors are laymen who may be confused by courtroom procedure, and a trial judge may take appropriate steps—such as non-coercive questioning, *United States v. Duke*, 527 F.2d 386, 394 (5th Cir.), *cert. denied*, 426 U.S. 952, 96 S.Ct. 3177, 49 L.Ed.2d 1190 (1976), or directing the jury to retire for further deliberations, *Sartore*, 456 F.2d at 966-67—to ascertain whether a juror actually intended to dissent from the published verdict. The trial judge here handled the matter properly, and petitioner's trial counsel plausibly may have concluded that Mobley's initial response did in fact appear to be the product of a simple misunderstanding and that further attempts to challenge the unanimity of the verdict would prove unavailing.

We therefore conclude that petitioner's claim of ineffective assistance of counsel is without merit. Although petitioner's trial counsel may have been relatively young and inexperienced in trying capital cases, the record reveals that he conducted a spirited defense and was quite successful in extracting testimony from the state's witnesses in support of his argument that petitioner was less culpable than his co-accused. The mere fact that his efforts were ultimately unavailing is not, of course, a sufficient basis upon which to condemn his performance.

VI. THE INFLAMMATORY EVIDENCE ISSUE

[13] During the resentencing trial, one of the investigating officers who had first examined the murder scene testified that a portion of the victim's ear and various other fragments of skin and bone had been found on the ground near her corpse. Over the objection of defense counsel, the desiccated remains of the ear and other fragments of bone and skin were introduced into evidence by the state. Petitioner contends that the introduction of this evidence was needlessly inflammatory and prejudicial, and that the state's actions therefore violate the Supreme Court's mandate in *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Although we would not wish to endorse the state's practice, this court has already held that the introduction of such evidence is permissible where it "depict[s] the scene of the crime," *Hance v. Zant*, 696 F.2d 940, 951 (11th Cir.), *cert. denied*, — U.S. —, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983), and we are of course bound by that decision.

VII. THE RIGHT TO SILENCE ISSUE

[14] Petitioner also claims that his right to remain silent under the fifth and fourteenth amendments was infringed by certain remarks of the trial judge during petitioner's closing argument to the jury. In accordance with Georgia law, the trial court had authorized petitioner to make a closing argument as co-counsel in his own behalf. During his closing, petitioner sought to persuade the jury that he could not have had the "depravity of mind" required to establish an aggravating circumstance under Off.Code Ga.Ann. § 17-10-30(b)(7). He conceded that the crime was "horrible," but then asked, "how could it cause depravity of mind on my part when I wasn't there; when I didn't have no idea that this man was going to kill this young lady. And sure, it was a horrible murder, but I did not commit the murder, so I didn't inflict the depravity of mind on my part—." At this point the trial judge interrupted and instructed the jury:

> [T]his man has not testified during the trial of the case and the State did not have an opportunity to cross examine him and he cannot make an unsworn statement to you at this time concerning the things he's just saying. He's acting as his own co-counsel and he is allowed to argue the evidence in the case, but he cannot get before you now and give testimony or give evidence. That should have come from the stand under oath, if he desired to do it.

Petitioner argues that, even if he did stray into error during the course of his argument, the trial court went far beyond what was necessary in terms of a curative instruction and subsequently failed to cure its own error in commenting upon petitioner's failure to take the stand. In *United States v. Lepiscopo*, 429 F.2d 258 (5th Cir.), *cert. denied*, 400 U.S. 948, 91 S.Ct. 255, 27 L.Ed.2d 254 (1970), this court considered a similar argument raised by a defendant appearing pro se who had adopted the practice of making asides to the jury during his questioning of an adverse witness. After twice warning him against making unsworn statements in the presence of the jury, the trial judge rebuked the defendant by stating, "Don't make comments. You'll have your opportunity to be sworn and testify, if you care to do so." The court held that these remarks, comparable to those before us in this case, "did not constitute a comment on defendant's failure to testify but rather reflected his right to take the stand and testify under oath if he so desired." *Id.* at 260. The *Lepiscopo* court also noted that the trial judge subsequently instructed the jury that a criminal defendant has the right to testify or to remain silent. Similar instructions were given in this case. We therefore conclude that this claim is without merit.

VIII. THE NONSTATUTORY AGGRAVATING CIRCUMSTANCES ISSUE

[15] Petitioner also contends that the trial judge erred by permitting the state to introduce court records of his prior convictions in Alabama for burglary and assault with intent to rob as aggravating evidence. Petitioner argues that these offenses are not relevant to any statutory aggravating circumstance available under Georgia law and asserts that permitting the state to introduce such evidence is contrary to the principles of *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and prior decisions of this court. In the interval since this case was originally briefed the Supreme Court has issued decisions in *Zant v. Stephens*, — U.S. —, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), and *Barclay v. Florida*, — U.S. —, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983) (plurality opinion), that seriously undermine petitioner's argument. In *Stephens*, the petitioner's death sentence had been based upon multiple aggravating circumstances, one of which—a finding that the defendant had a "substantial history of serious assaultive criminal convictions"—was subsequently invalidated on vagueness grounds by the Georgia Supreme Court. Stephens asserted that his death sentence should be vacated because the sentencing jury might have been swayed by the trial judge's jury instructions or by the evidence introduced in support of this invalid aggravating circumstance. The Court rejected this argument, noting that "[t]he underlying evidence is nevertheless fully admissible at the sentencing phase," — U.S. at —, 103 S.Ct. at 2747, since the Georgia statute provides that the sentencing judge or jury "shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions." Off.Code Ga.Ann. § 17-10-2(a); *see also id.* § 17-10-30(b) (judge or jury shall consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law" in addition to the specified statutory aggravating circumstances). The Court concluded:

> Nothing in the United States Constitution prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant's prior criminal record in making its sentencing determination, [citation omitted], even though the defendant's prior history of noncapital convictions could not *by itself* provide sufficient justification for imposing the death sentence.

— U.S. at —, 103 S.Ct. at 2749 (emphasis in original); *see also Barclay*, — U.S. at —, 103 S.Ct. at 3427; *id.* at —, 103 S.Ct. at 3437 (Stevens and Powell, JJ., concurring). Because the jury in this case based its death sentence on a finding of two proper aggravating circumstances, we believe it is clear under *Zant v. Stephens* and *Barclay v. Florida* that there was no constitutional error here.

IX. THE DOUBLE JEOPARDY ISSUE

Petitioner further alleges that the constitutional prohibition against double jeopardy was violated at his resentencing trial because the trial judge permitted the state to introduce evidence pertaining to petitioner's alleged rape of the victim and the theft of her automobile. Petitioner argues that his first sentencing jury had refused to find that he was guilty of the aggravating circumstances of rape or auto theft and asserts that this "finding" should stand as res judicata in future trials under *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). We disagree.

It is first necessary to clarify exactly what transpired at petitioner's original sentencing trial. Contrary to what petitioner suggests, the state did not ask for a finding that the murder had been committed in the course of a rape. Instead, it sought a finding that petitioner's crime involved the following three aggravating circumstances: (1) that the offense of murder was committed while the offender was engaged in the commission of the additional capital felonies of the kidnapping and armed robbery of Teresa Allen; (2) that the defendant committed the offense of murder for the purpose of receiving money and other things of value, namely, the victim's car; and (3) that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim and depravity of mind on the part of the defendant. The jury returned a death sentence based upon its finding that the first and third of these aggravating circumstances were present.

[16, 17] It is well established under Georgia law that sexual abuse may constitute "torture" for the purpose of finding an aggravating circumstance under section 17-10-30(b)(7). *See Burger v. Zant*, 718 F.2d 979, 986 (11th Cir.1983). Thus, the jury may well have taken the alleged rape into account in its consideration of whether the crime demonstrated torture to the victim and depravity of mind on the part of the defendant. Without an implicit refusal to find petitioner guilty of rape, there clearly is no constitutional barrier to admitting evidence of the alleged rape at petitioner's second sentencing trial.

In any event, we find petitioner's reliance on *Bullington* misplaced. In *Bullington*, the Court held that "[b]ecause the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one *acquitted* by a jury also is available to him, 'with respect to the death penalty, at his retrial.'" 451 U.S. at 446, 101 S.Ct. at 1862 (emphasis added). The Court's decision in *Bullington* therefore turned on its conclusion that a Missouri jury's verdict at the sentencing phase of a capital trial is more properly analogous to a decision on guilt/innocence than it is to a noncapital criminal sentence, stressing such differences as the use of a reasonable doubt standard and other procedural devices that "*explicitly requires* [ ] the jury to determine whether the prosecution has 'proved its case.'" *Id.* at 444, 101 S.Ct. at 1861 (emphasis in original).

[18, 19] One key distinction between petitioner's situation and that of Robert Bullington is immediately apparent—Bullington had been spared at his initial sentencing trial, whereas petitioner was sentenced to death at his. Since it has long been established that "there is no double jeopardy bar to retrying a defendant who has succeeded in overturning his conviction" on legal grounds, *id.* at 442, 101 S.Ct. at 1860,[3]

3. A different rule applies in cases in which the reversal is for insufficiency of the evidence. *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Petitioner also cites *Ashe*

petitioner's claim must ultimately rest on an extension of the Court's reasoning in *Bullington* to encompass the argument that factual findings on statutory aggravating circumstances are also the equivalent of a jury verdict on guilt or innocence. This we decline to do. As the Georgia Supreme Court pointed out while rejecting a similar argument in *Zant v. Redd*, 249 Ga. 211, 290 S.E.2d 36 (1982), *cert. denied*, — U.S. —, 103 S.Ct. 3552, 77 L.Ed.2d 1398 (1983):

> Aggravating circumstances are procedural safeguards designed to control a jury's discretion in capital cases in order to ensure against capricious and arbitrary enforcement of the death penalty. [Citations omitted] Aggravating circumstances are not substantive "penalties" or "offenses"; they do not place the defendant's life in peril or subject him to a possible "conviction"; they are standards which guide a jury's decision on what does place the defendant['s] life in jeopardy at the sentencing trial—the death penalty.

Id. 290 S.E.2d at 38. We would further note that a jury need find only a single aggravating circumstance to impose the death sentence, Off.Code Ga.Ann. § 17-10-31, and that the jury has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present. *Id.*; *Gregg v. Georgia*, 428 U.S. at 203, 96 S.Ct. at 2939. Thus, the legal significance that attaches to a jury's decision whether to state a given aggravating circumstance in support of its verdict is simply not comparable to that of the verdict itself. We therefore conclude that the analogy the Supreme Court drew between the verdict at a guilt/innocence trial and that at a sentencing hearing cannot be extended to cover a jury's findings on statutory aggravating circumstances.

X. THE JURY INSTRUCTIONS ISSUE

[20] The considerations stated in the preceding section also require us to reject petitioner's final contention: that his fourteenth amendment right to a fair trial at the sentencing phase was violated by the trial judge's refusal to instruct the jury that a defendant is presumed innocent of aggravating circumstances. Petitioner reasons that the presumption of innocence has been recognized as an essential component of the right to a fair trial, *see Taylor v. Kentucky*, 436 U.S. 478, 479, 98 S.Ct. 1930, 1931, 56 L.Ed.2d 468 (1978), and contends that since the Supreme Court has held that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause," *Gardner v. Florida*, 430 U.S. at 358, 97 S.Ct. at 1204, the presumption of innocence should be applied at the sentencing phase as well.

[21] As we indicated above, petitioner's argument ultimately founders upon the rocks of a false analogy between aggravating circumstances and the underlying criminal offense. First, while it is true that a Georgia sentencing jury cannot recommend the death penalty unless it finds that at least one aggravating circumstance exists beyond a reasonable doubt, Off.Code Ga. Ann. § 17-10-30(c), the jury is not required to return a death sentence whenever aggravating circumstances are found to exist. The function of statutory aggravating circumstances in Georgia is in fact quite limited: they serve to winnow down the number of cases in which the death penalty can be imposed by requiring the jury to focus its consideration on the particular circumstances of the crime. Once the jury has found that a given case is one of the limited number in which the death penalty is a possible sanction, however, its discretion in selecting capital punishment is absolute. *Zant v. Stephens*, 250 Ga. 97, 297 S.E.2d 1,

v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) in support of his argument, but *Ashe* is inapposite since it applies only to cases in which multiple criminal prosecutions grow out of a single alleged criminal act. The petitioner in *Ashe*, for example, had been acquitted in a prior prosecution for robbing one of the players in a poker game and was subsequently tried and convicted on another robbery charge growing out of the same events. In this case, in contrast, petitioner can point to neither a prior valid judgment nor an acquittal.

3 (1982). Thus, while a finding of each element of an offense beyond a reasonable doubt will result in a conviction for that offense, a similar finding beyond a reasonable doubt of an aggravating circumstance will not automatically trigger a sentence of death.

Therefore, the considerations that justify the presumption of innocence at a defendant's original trial are simply inapplicable here. A defendant does not arrive at the penalty phase of a capital proceeding with a clean slate, and there is no point in pretending otherwise. The state's evidence at the original trial is usually adopted in its entirety at the sentencing proceeding, and the state's proof that the accused committed the underlying offenses usually encompasses its proof as to statutory aggravating circumstances.[3] Because the same jurors (at least in the first instance) usually make the decision on both guilt/innocence and punishment, it would elevate form over substance to instruct them that the evidence which they have just evaluated and found convincing beyond a reasonable doubt should be disregarded in favor of granting the defendant a presumption of innocence. We also note that the Supreme Court has repeatedly found that a defendant's due process rights are adequately protected by the provisions of the existing Georgia capital punishment statute, which does not create a presumption against the existence of statutory aggravating circumstances. In view of these considerations, we believe the trial court did not err in refusing to employ the instruction requested by petitioner.

CONCLUSION

We have carefully reviewed the contentions presented by petitioner and conclude that all of them are without merit.

AFFIRMED.

3. For example, it would frequently be impossible to distinguish the evidence that establishes that a murder was committed from the evidence that establishes that it was committed in an

Appendix E

Judgment of the United States Court of Appeals
for the Eleventh Circuit,
entered July 30, 1984

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 82-8773

D.C. Docket No. 82-161-2

ROOSEVELT GREEN, JR.,

Petitioner-Appellant,

versus

WALTER D. ZANT,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

---

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED.

Entered: July 30, 1984
For the Court: Spencer D. Mercer, Clerk
By: [signature]
Deputy Clerk

ISSUED AS MANDATE:

Appendix F

Order denying rehearing and rehearing en banc, entered September 13, 1984

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
SEP 13 1984
Spencer D. Mercer
Clerk

No. 82-8773

ROOSEVELT GREEN, JR.,

Petitioner-Appellant,

versus

WALTER D. ZANT,

Respondent-Appellee.

Appeal from the United States District Court for the
Middle District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 30, 1984, 11 Cir., 198_4 ____F.2d____).

(September 13, 1984)

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

REHC-6
(Rev. 6/82)

Appendix G

Order staying mandate until October 15, 1984,
entered September 25, 1984

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED

SEP 25 1984

Spencer D. Mercer
Clerk

No. 82-8773

ROOSEVELT GREEN, JR.,

Petitioner-Appellant,

versus

WALTER D. ZANT,

Respondent-Appellee.

Appeal from the United States District Court for the
Middle District of Georgia

O R D E R :

( ) The motion of appellant, Roosevelt Green, Jr., for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of appellant, Roosevelt Green, Jr., for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including October 15, 1984, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

Robert S. Vance
UNITED STATES CIRCUIT JUDGE

MDT-4
(Rev. 6/82)

OPPOSITION BRIEF

ORIGINAL

NO. 84-5609

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ROOSEVELT GREEN, JR.,

Petitioner,

v.

RALPH KEMP, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

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25pp

QUESTIONS PRESENTED

1.

Whether the circuit court properly found that the instant case was distinguishable from Enmund v. Florida, 458 U.S. 782 (1982)?

2.

Whether the circuit court properly found that the evidence of Petitioner's rape of the victim was properly admitted at Petitioner's retrial on sentencing where there existed no implicit refusal to find Petitioner guilty of rape at the first trial, and in light of the function of statutory aggravating circumstances under Georgia's capital sentencing statute?

3.

Whether the circuit court properly found that the trial court's admonition to the jury that Petitioner's pro se closing argument did not constitute evidence was not an impermissible comment on Petitioner's right to testify or to remain silent?

4.

Whether the circuit court properly found that the introduction by the prosecutor of evidence which depicted the scene of Petitioner's crime did not violate Petitioner's Eighth Amendment rights?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PART ONE

PROCEDURAL HISTORY

Petitioner, Roosevelt Green, Jr., was convicted of the murder of Teresa Carol Allen in January, 1978 in the Superior Court of Monroe County, Georgia. Following a trial by jury Petitioner was sentenced to death.

On direct appeal to the Supreme Court of Georgia Petitioner's conviction and sentence were affirmed. Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978). On application for a writ of certiorari, this Court vacated Petitioner's death sentence and remanded for further proceedings. Green v. Georgia, 442 U.S. 95 (1979). The Supreme Court of Georgia remanded the case to the trial court with directions to retry the sentencing portion of Petitioner's trial. Green v. State, 242 Ga. 27, 257 S.E.2d 54 (1979).

The retrial on sentencing resulted in the reimposition of a death sentence. The Supreme Court of Georgia affirmed at Green v. State, 246 Ga. 598, 272 S.E.2d 475 (1980). This Court subsequently denied Petitioner's application for a writ of certiorari at Green v. Georgia, 450 U.S. 936 (1981).

Following denial of relief on direct appeal, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, raising some twenty-nine allegations. An evidentiary hearing was had on the subject petition on August 10, 1981, and by Order dated September 18, 1981 the Superior Court of Butts County, Georgia denied Petitioner habeas corpus relief. On November 5, 1981 the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal, and this Court subsequently denied Petitioner's application for a writ of certiorari at Green v. Zant, 455 U.S. 983 (1982).

Petitioner next filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia (Macon Division) on May 6, 1982. On November 23, 1982 the federal district court entered an Order denying the Petitioner's motion for an evidentiary hearing and on November 24, 1982, entered judgment denying Petitioner's petition for a writ of habeas corpus. On December 20, 1982 the district court granted the Petitioner a certificate of probable cause to appeal its Order and Judgment denying relief in habeas corpus.

The instant case was thoroughly briefed and argued before the United States Court of Appeals for the Eleventh Circuit, and on September 19, 1983 the circuit court rendered its opinion remanding this matter to the district court for the conducting of a limited evidentiary hearing. Green v. Zant, 715 F.2d 551 (11th Cir. 1983). After receipt of the supplemented record from the district court, the circuit court rendered its opinion affirming the district court's complete denial of habeas corpus relief. It is from the latter opinion of the circuit court that Petitioner seeks a writ of certiorari from this Court directed to the Eleventh Circuit Court of Appeals.

STATEMENT OF FACTS

The Petitioner, Roosevelt Green, Jr., was indicted by the Monroe County grand jury for the offense of malice murder. Following a trial by jury Petitioner was found guilty and sentenced to death. His initial sentence of death was vacated and upon a subsequent retrial the sentence of death was again imposed. At the second sentencing proceeding the jury recommended the death penalty, as authorized by the following statutory aggravating circumstances:

1. The murder was committed while the offender was engaged in the commission of another capital felony, to wit: kidnapping and armed robbery. Ga. Code Ann. § 27-2534.1(b)(2); now codified as O.C.G.A. § 17-10-30(b)(2).

2. The offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind and aggravated battery to the victim. Ga. Code Ann. § 27-2534.1(b)(7); now codified as O.C.G.A. § 17-10-30(b)(7).

The evidence introduced at the two trials was substantially similar. The facts recited by the Supreme Court of Georgia in Petitioner's companion case, Moore v. State, 240 Ga. 807, 243 S.E.2d 1 (1978) portray the factual situation present in Petitioner's case. On direct appeal of Petitioner's resentencing, the Supreme Court of Georgia did, in addition to referring to its opinion in Petitioner's previous appeal, specifically find the following:

From the evidence presented at the trial the jury was authorized to find the following:

a. The Appellant was in the area where Miss Allen was robbed and kidnapped shortly before the crime without any means of transportation or funds.

b. He was not seen in the area after the kidnapping and robbery occurred.

c. The appellant appeared in South Carolina driving Teresa Allen's automobile (which he asked a friend to burn for him) approximately nine hours after the robbery and kidnapping.

d. The convenience store in Cochran that Ms. Allen operated was robbed of bills and change. When he appeared in South Carolina, the Appellant had in his possession a large quantity of money, both bills and change.

e. The Appellant had the murder weapon in his possession when he arrived in South Carolina.

f. A glove found at the scene of the murder had hairs on it similar to those of both Appellant and the victim.

g. Caucasian head hair identical to the hair of the victim was located on a sweater located in the Appellant's suit case.

h. Approximately twelve days after Teresa Allen had been shot to death in Monroe County, Georgia, the Appellant told his girlfriend that he had shot and killed a girl in Georgia.

Green v. State, 242 Ga. at 262.

Further facts will be developed as necessary to respond to the contentions presented by the Petitioner.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE INSTANT CASE WAS DISTINGUISHABLE FROM ENMUND V. FLORIDA, 458 U.S. 782 (1982).

In this application for a writ of certiorari Petitioner contends that the imposition of the death penalty in his case is unconstitutional under the principles set forth by this Court in Enmund v. Florida, 458 U.S. 782 (1982). In Enmund, supra, this Court held that the Eighth Amendment does not permit the imposition of the death penalty upon a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Id. at 797. Petitioner contends that he falls within the purview of the Enmund rule because witness Thomas Pasby testified at Petitioner's retrial on sentencing that Moore (Petitioner's accomplice in the murder) claimed to have committed the murder after sending Petitioner away to get some gasoline, and that Petitioner allegedly did not know that he (Moore) was going to shoot the victim.

As an initial matter, Respondent notes that this case is distinguishable from Enmund, supra in that the instant case was presented to the jury solely on a malice murder theory, as opposed to felony murder. As noted by the circuit court, in his closing argument the prosecutor contended that Petitioner fired the fatal shots, noting that Petitioner was driving the victim's car, was in possession of the murder weapon when he was arrested in South Carolina and that Petitioner had bragged

to his girlfriend that he had shot or killed a girl somewhere in Georgia. (T. 940).[1] The trial court instructed Petitioner's jury on the guilt-innocence phase of trial regarding the elements of malice murder and informed them that they could not find Petitioner guilty unless they found "that he was present at the scene of the alleged crime and his presence is an essential element of the crime alleged in the indictment." Even viewing Pasby's testimony in a light most favorable to the Petitioner, Pasby testified that Petitioner had been a full participant in the robbery of the Majik Market where the victim worked, as well as in the victim's abduction and rape, and that Petitioner later assisted Moore in disposing of the victim's corpse by throwing the same in a cluster of bushes near the scene of the murder. (T. 912-913).

The jury in the instant case was squarely presented with an indictment charging only malice murder. It was carefully instructed on the elements of the offense of malice murder and there was direct evidence in the record to support the jury's verdict. Thus, under this Court's holding in Enmund, supra, the instant case is clearly distinguishable, and this Court's Enmund rule is not applicable.

Petitioner's trial jury's verdict of malice murder thus constitutes a specific finding of fact that Petitioner killed, attempted to kill or intended to kill. The foregoing finding of fact by Petitioner's trial jury, which finding of fact was made at the conclusion of Petitioner's guilt-innocence phase of trial, clearly undermines Petitioner's contention that this case is in any way affected by the Enmund rule.

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[1] References to the transcript of the resentencing trial are "T.____).

Further, Respondent notes that in his application for a writ of certiorari Petitioner contends, for the first time before this Court, that Pasby's hearsay testimony should have been admitted on the guilt-innocence phase of Petitioner's trial. Because this assertion is made for the first time on this application for a writ of certiorari, the same is not properly presented to this Court for review, and thus should not serve as the basis for the granting of the requested writ. Cardinale v. Louisiana, 394 U.S. 437 (1969). Moreover, Respondent notes that on this application for a writ of certiorari Petitioner conspicuously fails to note for the Court's benefit that Pasby's testimony was never offered by Petitioner at the guilt-innocence phase of his trial. The testimony of Pasby was offered for the very first time during the sentencing phase of Petitioner's original trial, which phase occurred after the jury's verdict finding Petitioner guilty of malice murder. See Green v. Georgia, 442 U.S. 95, 96 (1979). In the aforementioned opinion, this Court noted that Pasby's testimony constituted inadmissible hearsay under then Ga. Code Ann. § 38-301, but because the " . . . excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, (cites omitted)," (emphasis added), the testimony should have been allowed into evidence for use by the jury in determining the appropriate sentence to be imposed.[2] Because Pasby's testimony would have constituted inadmissible hearsay under then Ga. Code Ann. § 38-301 if it had been offered during the guilt-innocence phase of Petitioner's trial, Petitioner's contention that his case falls within the purview of the Enmund rule because his trial

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[2]On Petitioner's retrial on sentencing, the testimony of Pasby was in fact admitted into evidence, not withstanding which the jury reimposed a sentence of death upon Petitioner.

jury was not afforded the opportunity to consider inadmissible hearsay testimony during the guilt-innocence phase of the trial, which testimony was in fact never offered for admission during the aforementioned phase of trial, is totally without merit and cannot serve as the basis for the granting of the requested writ.

B. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE EVIDENCE OF PETITIONER'S RAPE OF THE VICTIM WAS PROPERLY ADMITTED AT PETITIONER'S RETRIAL ON SENTENCING AS THERE EXISTED NO IMPLICIT REFUSAL TO FIND PETITIONER GUILTY OF RAPE AT THE FIRST TRIAL, AND IN LIGHT OF THE FUNCTION OF STATUTORY AGGRAVATING CIRCUMSTANCES UNDER GEORGIA'S CAPITAL SENTENCING STATUTE.

On this application Petitioner contends that the constitutional prohibition against double jeopardy was violated at his retrial on sentencing because the trial judge permitted the State to introduce evidence pertaining to Petitioner's rape of the victim. Petitioner contends that at his initial trial on sentencing, the jury refused to find that he was guilty of the aggravating circumstance of rape and that this finding should stand as res judicata or have collateral estoppel effects in future trials under this Court's holding in Bullington v. Missouri, 451 U.S. 430 (1981). Because Petitioner has misinterpreted what actually transpired at his original trial on sentencing and because Petitioner incorrectly comprehends the function of statutory aggravating circumstances under Georgia's capital sentencing statute, the instant contention cannot serve as the basis for the granting of the requested writ.

As noted by the circuit court, "[i]t is first necessary to clarify exactly what transpired at Petitioner's original sentencing trial." Green v. Zant, 738 F.2d at 1540. Contrary to Petitioner's suggestions, as correctly noted by the circuit court, the State did not ask the trial court for a finding that the murder had been committed during the commission of another capital felony, to wit, a rape. Instead, the State sought the submission of the following three statutory aggravating

circumstances to the jury for its consideration on the sentencing phase of trial.

1. That the offense of murder was committed while the defendant was engaged in the commission of the additional capital felonies of the kidnapping and armed robbery of Teresa Allen.

2. That the defendant committed the offense of murder for the purpose of receiving money and other things of value, namely, the victim's car.

3. That the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim and depravity of mind on the part of the defendant.

On the sentencing phase of trial the jury returned a death sentence after finding that the same was authorized by a finding beyond a reasonable doubt of the first and third of the aforementioned statutory aggravating circumstances.

Under Georgia law it is well established that sexual abuse may constitute torture for the purpose of finding a statutory aggravating circumstance under O.C.G.A. § 17-10-30(b)(7). See Burger v. Zant, 718 F.2d 979, 986 (11th Cir. 1983). Thus, the evidence of the rape of the victim was properly admitted and was properly utilized by the jury in its consideration of whether the crime demonstrated torture to the victim and depravity of mind on the part of the defendant. As noted by the circuit court, in the absence of an implicit refusal to find Petitioner guilty of rape during his initial trial on the issue of guilt or innocence, there clearly exists no

constitutional barrier to admitting evidence of the rape of the victim at Petitioner's retrial on sentencing.

Further, Respondent notes that Petitioner's reliance upon Bullington, supra is misplaced. In Bullington, this Court held that because the sentencing proceeding at the petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the double jeopardy clause to one acquitted by a jury should have also been made available to him with respect to the death penalty which was sought at his retrial. Bullington, 451 U.S. at 446. As is readily apparent, this Court's decision in Bullington turned on its conclusion that a Missouri jury's verdict on the sentencing phase of a capital trial is more properly analogous to a decision on the issue of guilt or innocence than it is to a non-capital criminal sentence, stressing such differences as the use of a reasonable doubt standard and other procedural devices that "explicitly require the jury to determine whether the prosecution has proved its case." Id. at 444.

Respondent notes that a significant distinction between the instant case and that of the petitioner in Bullington, supra is that unlike Robert Bullington, the Petitioner in the instant case was sentenced to death at his initial trial on sentencing. Because of this distinction, in order for Petitioner to prevail on his double jeopardy claim, the district court and the circuit court below would have had to extend this Court's reasoning in Bullington, supra to encompass an argument that factual findings on the existence or non-existence of statutory aggravating circumstances, as statutorily defined in Georgia, are the equivalent of a jury verdict on guilt or innocence. Because of the clear rejection of this position by the Supreme Court of Georgia, the circuit court properly declined to make such a finding. In Zant v. Redd, 249 Ga. 211, 290 S.E.2d 36 (1982), cert. denied, ___ U.S. ____, 103 S.Ct. 3552, 77 L.Ed.2d 1398 (1983), the Supreme Court of Georgia stated the following:

> Aggravating circumstances are procedural safeguards designed to control a jury's discretion in capital cases in order to ensure against capricious and arbitrary enforcement of the death penalty. [Citations omitted]. Aggravating circumstances are not substantive "penalties" or "offenses"; they do not place the defendant's life in peril or subject him to a possible "conviction"; they are standards which guide a jury's decision on what does place the defendant['s] life in jeopardy at the sentencing trial - the death penalty.

Id. 290 S.E.2d at 38.

Respondent further notes that under Georgia's statutory scheme for the imposition of capital punishment a jury need only find a single statutory aggravating circumstance to be authorized to consider death as a possible punishment. O.C.G.A. § 17-10-31. See Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983). Zant v. Stephens, 250 Ga. 97, 297 S.E.2d 1 (1982). Further, a sentencing jury has the power to decline to impose the death penalty ever if it finds that one or more statutory aggravating circumstances are present beyond a reasonable doubt. O.C.G.A. § 17-10-31. Gregg v. Georgia, 428 U.S. 153, 203 (1976). Thus, the circuit court correctly concluded that the legal significance that attaches to a Georgia sentencing jury's decision whether to specify its finding of a given statutory aggravating circumstance in support of its verdict is simply not comparable to that of the verdict itself. Because of the lack of such a comparison, the analogy that this Court drew in Bullington, supra between the verdict at a guilt-innocence trial and that at a sentencing hearing cannot be extended to cover a Georgia jury's finding on

one or more statutory aggravating circumstances. Accordingly, Petitioner's assertions to the contrary cannot serve as the basis for the granting of the requested writ.

C. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE TRIAL COURT'S ADMONITION TO THE JURY THAT PETITIONER'S PRO SE CLOSING ARGUMENT DID NOT CONSTITUTE EVIDENCE WAS NOT AN IMPERMISSIBLE COMMENT ON PETITIONER'S RIGHT TO TESTIFY OR REMAIN SILENT.

On this contention Petitioner asserts that the trial court improperly commented on his failure to testify in violation of his Fifth and Fourteenth Amendment rights. Specifically, Petitioner refers to instructions given to the jury by the trial court during the Petitioner's pro se closing argument where he served as co-counsel. The trial transcript reflects that Petitioner was allowed to serve as co-counsel and in that capacity was allowed to make a closing argument to the jury. During that argument the Petitioner attempted to testify by stating that, " . . . I wasn't there; . . . I didn't have no idea that man was going to kill this young lady." (T. 1034). Following that improper testimony by the Petitioner the State's timely objection was sustained. The transcript further reflects that the trial court then instructed Petitioner's jury to disregard the statement and addressed the jury specifically as follows:

> I will state to the jury, this man has not testified during the trial of the case and the State did not have an opportunity to cross-examine him and he could not make an unsworn statement to you at this time concerning the things he's just saying. He's acting as his own co-counsel and he is allowed to argue the evidence in the case, but he cannot get before you now and give testimony or give evidence. That should

have come from the stand under oath, if he desired to do it. I will sustain the objection. I cautioned you about that and I know that you aren't tutored in the law and I understand but you can argue the evidence but do not make any statement in the nature of testimony.

(T. 1034).

On direct appeal the Supreme Court of Georgia reviewed this argument by Petitioner and held that the trial court did not abuse its discretion in ruling the Petitioner's argument improper. See Green v. State, at 602. The Supreme Court of Georgia continued by noting that:

> Given the State's timely objection to the Appellant's improper argument, the court was under an affirmative duty to instruct the jury to disregard said statement and to rebuke counsel for his remarks . . . . (Cites omitted).
>
> The extent of the rebuke and the instructions is within the discretion of the trial judge. (Cites omitted). We conclude that the trial court's instructions to the jury as quoted were not direct comments on the failure of the defendant to testify, but were explanations as to why such statements were to be disregarded by the jury.

Id. at 602-603.

Following the trial court's instructions to the jury, Petitioner's counsel made a motion for a mistrial. The motion for a mistrial was overruled with the Court stating, outside the presence of the jury. "[b]efore this man was allowed to present his argument, he came before me in your presence and I

have specifically instructed him as to the limitation of his argument. Of course, you also indicated that to him, and he flagrantly failed to follow the instructions of the court." (T. 1035).

Respondent respectfully submits that the circumstances of the instant case, as determined by the circuit court, are similar to those in United States v. Lepiscopo, 429 F.2d 259 (5th Cir. 1970), and United States v. Bynum, 566 F.2d 914 (5th Cir. 1978), in which cases the circuit court held that, in a circumstance similar to the one in the instant case, the trial court's instructions did not constitute a comment on the defendant's failure to testify, but rather reflected the defendant's right to take the stand and to testify under oath if he so desired. Additionally, as in United States v. Lepiscopo, the trial judge in the instant case, in his final instructions to the jury, did in fact instruct the jury that the Petitioner's failure to testify on his own behalf should not create any presumption against him. (T. 1126).

For all of the above and foregoing reasons, as this assertion by the Petitioner is clearly without merit the same cannot serve as the basis for the granting of the requested writ.

D. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE INTRODUCTION BY THE PROSECUTOR OF EVIDENCE WHICH DEPICTED THE SCENE OF PETITIONER'S CRIME DID NOT VIOLATE PETITIONER'S EIGHTH AMENDMENT RIGHTS.

On this last contention, Petitioner alleges that the trial court improperly admitted evidence of portions of the victim's body in violation of his Eighth Amendment rights. It is the Respondent's contention that the circuit court properly affirmed the district court's decision resolving this issue adversely to the Petitioner.

On Petitioner's first appeal to the Supreme Court of Georgia, that court held that:

> Exhibits 26, 27 and 28 being pieces of flesh, bone, and teeth, because of their proximity to the lead jacket and the cartridge cases fired from the rifle were relevant for the jury's consideration of a causal connection between the rifle possessed by the Appellant, the cartridges fired therefrom and injuries to the victim.

Green v. State, 242 Ga. at 267.

Certainly, during the sentencing phase of trial the nature and extent of the damage done to the victim's body shortly prior to death and a reconstruction of the crime scene are important considerations for the jury's use in its determination of the appropriate penalty to be imposed. Petitioner contends that this evidence, which was material to a reconstruction of the damage done to the victim's body and a reconstruction of the crime scene, was improperly admitted because it allegedly inflamed and prejudiced the minds of the jury against him. The Respondent submits, however, that where, as in the instant case, one of the statutory aggravating

circumstances that the State was required to prove was Ga. Code Ann. § 27-2534.1(b)(7), now codified as O.C.G.A. § 17-10-30(b)(7), the evidence was properly admitted. In the instant case the crime was brutal, inhuman and horrifying, and the evidence presented by the State reflected those unpalatable characteristics of the crime. The Respondent submits that the foregoing are the very characteristics that distinguish certain murders, as the instant murder, from those which unfortunately have come to be known as simple, routine, or ordinary murders. However, as this Court noted in Godfrey v. Georgia, 446 U.S. 420 (1980), for the seventh statutory aggravating circumstance to be constitutionally applied, as it was in the instant case, the evidence presented at trial must satisfy certain specific criteria. The Supreme Court of Georgia, in its mandatory statutory review, must have "independently assessed the evidence of record and determined that such evidence supports the trial judge's or jury's finding of an aggravating circumstance." Godfrey v. Georgia, at 429.

Respondent respectfully submits that in the instant case the Petitioner committed a vicious act, and though the results of the act were unpleasant, the evidence of which the Petitioner complains was necessary to allow the jury to make an informed decision on whether the acts of the Petitioner were of such magnitude as to authorize the finding beyond a reasonable doubt of the statutory aggravating circumstances proffered by the State and thus authorize the imposition of the death penalty under Georgia's statutory scheme. Godfrey v. Georgia, supra. Hance v. Zant, 696 F.2d 940 (11th Cir.), cert. denied, ___ U.S. ___, 103 S.Ct. 3544 (1983).

CONCLUSION

This Court should refuse to grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed, in addition to being demonstrably in accord with the applicable decisions of this Court, is soundly based upon a proper construction of state law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William B. Hill, Jr., Attorney of Record for Respondent and a member of the Bar of the Supreme Court of the United States certify that in accordance with the rules of the Supreme Court of the United States I have this day served a true and correct copy of this Brief for the Respondent in Opposition upon the Petitioner's attorney by depositing a copy of this Brief in the United States mail with the proper address and adequate postage to:

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This 15th day of November, 1984.

William B. Hill, Jr.
WILLIAM B. HILL, JR.
Senior Assistant Attorney General

OPINION

SUPREME COURT OF THE UNITED STATES

No. 84-5609 (A-503)

ROOSEVELT GREEN, JR., PETITIONER v. WALTER D. ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC & CLASSIFICATION CENTER

ON PETITION FOR REHEARING AND ON APPLICATION FOR STAY OF EXECUTION OF SENTENCE OF DEATH

[January 7, 1985]

The application for stay of execution of sentence of death presented to JUSTICE POWELL and by him referred to the Court is denied. The petition for rehearing is denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would grant the application for a stay of execution. But even if I believed otherwise, I would at the very least stay this impending execution pending the outcome of related cases now before the Court of Appeals for the Eleventh Circuit.

In his petitions for state and federal habeas relief, the applicant Roosevelt Green, Jr. has unsuccessfully requested evidentiary hearings to substantiate his allegation that he received the death penalty pursuant to a pattern and practice of racial discrimination in the administration of Georgia's capital sentencing system. The Eleventh Circuit en banc is currently considering three cases that present the *identical* issue and turn on the *identical* statistical evidence. See, *e. g.*, *Ross* v. *Hopper*, 716 F. 2d 1528 (1983), rehearing en banc granted, 729 F. 2d 1298 (1984); *Spencer* v. *Zant*, 715 F. 2d 1562 (1983), reconsideration en banc stayed, 729 F. 2d 1298 (1984); *McCleskey* v. *Zant*, 580 F. Supp. 338 (ND Ga.),

hearing en banc granted, 729 F. 2d 1238 (CA11 1984). As I argued last month in my dissent in *Stephens* v. *Kemp*, —— U. S. ——, —— (1984)—a case that also hinged on the claims and evidence instantly at issue—"there is at the very least a substantial question whether [the petitioner's] fate should be governed by the outcome of the consolidated cases that are now pending before the Eleventh Circuit en banc . . . ." Because "a person should not be executed while the constitutionality of his sentence is in doubt," *Stephens* v. *Kemp*, —— U. S. ——, —— (1984) (BRENNAN, J., dissenting), I would accordingly stay Green's execution pending the ultimate resolution of *Ross*, *Spencer*, and *McCleskey*.

JUSTICE BLACKMUN and JUSTICE STEVENS dissent and would grant the application for stay of execution pending the ultimate resolution of the cases now pending in the United States Court of Appeals for the Eleventh Circuit and cited in JUSTICE BRENNAN's dissent, *ante*.

JUSTICE POWELL took no part in the consideration or decision of this application and petition.